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The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation

Eugene Kontorovich*

INTRODUCTION

In recent years, courts around the world have relied on universal jurisdiction with increasing frequency to justify proceedings against alleged perpetrators of human rights offenses in foreign countries.¹ The doctrine of universal jurisdiction holds that a nation can prosecute offenses to which it has no connection at all—the jurisdiction is based solely on the extraordinary heinousness of the alleged conduct.² According to the doctrine, any nation can prosecute universal offenses, even over the objection of the defendants' and victims' home states.³ Examples of universal jurisdiction include Belgium's indictment of Israeli Prime Minister Ariel Sharon for alleged responsibility for war crimes committed by Christian Arabs against Muslim Arabs in Lebanon and the conviction by German and Swiss courts of Serbian officials who committed war crimes against Bosnian Muslims.⁴

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1. See Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150 ("With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities committed abroad.").

2. See PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited Dec. 1, 2003).

3. See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) ("Where a state has universal jurisdiction, it may punish conduct although the state has no links of territoriality or nationality with the offender or victim." (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987))); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323–24 (2001) (describing universal jurisdiction as jurisdiction with no "nexus between the regulating nation and the conduct, offender, or victim"); Nicolaos Stratapas, *Universal Jurisdiction and the International Criminal Court*, 29 MANITOBA L.J. 1, 11 (2002) (defining universal jurisdiction as the jurisdiction that all states can exercise "even against the wishes of the State having territorial or any other form of jurisdiction").

4. See Comm. on Int'l Human Rights Law & Practice, Int'l L. Ass'n, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, at 26–28 (2000) [hereinafter INT'L L. ASS'N, *Final Report*].

Universal jurisdiction can have dangerous consequences,⁵ especially in the absence of generally accepted limitations on its scope. Unlike all other forms of international jurisdiction, the universal kind is not premised on notions of sovereignty or state consent. Rather, it is intended to override them.⁶ An assertion of universal jurisdiction can create conflict and possibly hostilities among countries because it can be construed as an encroachment on the sovereign authority of the country that has traditional jurisdiction over the offense.⁷ For hundreds of years, universal jurisdiction only applied to the crime of piracy.⁸ In recent decades, however, universal jurisdiction has been asserted over many human rights offenses. The expansion in universal jurisdiction's scope has been accompanied by an increase in states' willingness to use it.

Advocates of "new universal jurisdiction,"⁹ or "NUJ" as it will be called in this Article, have sought to establish its legitimacy by invoking piracy as a precedent, justification, and inspiration.¹⁰ This Article will use the phrase

5. As Justice Story observed in *United States v. La Jeune Eugenie*, a case where he refused to exercise universal jurisdiction over an allegedly French vessel, "rarely can a case come before a court of justice . . . more likely to excite the jealousies of a foreign government, zealous to assert its own rights." 26 F. Cas. 832, 841 (D. Mass. 1822) (No. 15,551). The mere possibility of universal jurisdiction in that case had complicated diplomatic relations between the United States and France. *See id. See also* Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 340 (2001) (explaining that broad universal jurisdiction, especially over acts of state, has the "potential for sparking interstate conflict" and for being used "as a tool of interstate conflict"); Bradley, *supra* note 3, at 325 (observing that universal jurisdiction can "undermine peaceful international relations").

6. *See* Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, at 86 ("The doctrine of universal jurisdiction asserts that some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers.").

7. *See* Strapatsas, *supra* note 3, at 5 (observing that universal jurisdiction can threaten international relations "because [assertions of universal jurisdiction] could be interpreted by the State where the crime has been committed as . . . a violation of its sovereignty").

8. *See* United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) ("[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes."); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 69 (Sept. 7) (Moore, J., dissenting) ("Piracy by law of nations, in its jurisdictional aspects, is *sui generis*."). In the Restatement (Second) of Foreign Relations Law (1965), piracy was listed as the only universally cognizable offense. The Restatement (Third) of Foreign Relations added several other universal crimes, such as war crimes and apartheid. RESTATEMENT (THIRD) OF FOREIGN RELATIONS Law § 404 (1987).

9. This Article will refer to the recent expansion of universal jurisdiction to human rights offenses as "modern" or "new" universal jurisdiction. This distinguishes it from the "old" or "traditional" universal jurisdiction that historically applied only to piracy. At the same time, this nomenclature hints at the relationship between the new universal jurisdiction and another post-war development: the "new customary international law." *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838–41 (1997). Unlike traditional customary international law, the new form focuses on human rights offenses (which often involve a state's treatment of its own citizens). *See id.* at 841. Further, it extracts international norms from proclamations rather than observed state practice and considers certain rules to be binding international law norms even if they clearly conflict with state practice. *See id.* at 839. Thus, both the new universal jurisdiction and the new customary international law have a sharply natural law cast and focus on human rights offenses. And both developments seek or tend to downplay the importance of sovereignty and state consent.

10. *See, e.g.*, MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 325 (2003) ("The universality principle is perhaps best illustrated by the jurisdiction that every state traditionally has over pirates."); PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 2, at 45 (describing piracy as

“piracy analogy” to refer to the argument that NUJ is based on principles implicit in the earlier, piracy-only universal jurisdiction. According to the piracy analogy, international law treated piracy as universally cognizable because of its extraordinary heinousness. Universal jurisdiction was never about piracy *per se*, the argument goes, but about allowing any nation to punish the world’s worst and most heinous crimes. Thus universal jurisdiction over human rights violations is simply an application of the well-settled principle that the most heinous offenses are universally cognizable and not, as critics contend, a radical and dangerous encroachment on nations’ sovereignty.

The piracy analogy underpins NUJ. It is “crucial to the origins of universal jurisdiction,” according to the Princeton Principles on Universal Jurisdiction, a sort of “Restatement” of NUJ doctrine.¹¹ The seminal cases that helped expand universal jurisdiction to new offenses—the decisions of the Nazi war crimes tribunals, *Eichmann*,¹² *Filartiga*,¹³ and the Yugoslavian war crimes tribunal created by the United Nations¹⁴—have all used the piracy analogy.¹⁵ The piracy analogy has also won general acceptance among international law scholars.¹⁶ Even those who criticize NUJ on other grounds do

the “paradigmatic[]” universal jurisdiction crime); Louis Sohn, *Introduction to BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* (1980) (“The first breakthrough [for punishing ‘international crime’] occurred when international law accepted the concepts that pirates are ‘enemies of mankind’ and once this concept of an international crime was developed in one area, it was soon applied by analogy in other fields.”); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 108 (2001) (“Piracy is deemed the basis of universal criminal jurisdiction.”); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53, 60–63 (1981) (arguing that NUJ builds on a doctrine that had previously been applied primarily to piracy but could logically extend to any offense widely recognized for its depravity); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 798 (1988) (“The concept of universal jurisdiction over piracy has had enduring value . . . by supporting the extension of universal jurisdiction to certain modern offenses somewhat resembling piracy.”); Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*, WORLD POL’Y J., Spring 2001, at 101, 105 (“Piracy on the high seas is sometimes presented as the classic inspiration for the concept of universal jurisdiction.”); Quincy Wright, *War Criminals*, 39 AM. J. INT’L. L. 257, 280, 283 (1945) (suggesting that while piracy is the “classic illustration of offenses against universal law” the concept can be extended to “other offenses . . . inherent in the conception of a world community,” such as the Nazi war crimes); Michael Kirby, Criminal Law, Speech Before the International Society for Reform of Criminal Law Conference (Aug. 27, 2001) *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimalaw.htm#_ftn1 (last visited Dec. 1, 2003) (“The international legal principles of universal jurisdiction . . . can be traced to the early responses of the law of nations to piracy.”); *Crossfire* (CNN television broadcast, Feb. 27, 1991) (transcript No. 156) (“From an international law standpoint, any court has jurisdiction over Saddam Hussein because what he’s done, war crimes, there’s a theory of universal jurisdiction . . . It goes back to piracy. Anyone who could catch a pirate could try him.”).

11. PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 2, at 45.

12. *Eichmann v. Attorney-General*, 36 I.L.R. 277 (Isr. 1962).

13. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

14. *E.g., Prosecutor v. Furundzija*, Case No. IT-95-17, Judgement (Dec. 10, 1998).

15. See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 58 (2003) (observing that some jurists have argued for universal jurisdiction over modern human rights offenses by analogizing them to piracy).

16. Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 361 n.230 (1997) (noting that scholars and judges have treated the doctrine of *hostis humani generis*, which applies to piracy, in the law of nations as a “precursor to modern

not dispute that it is a logical application of the policies that made piracy universally cognizable. Given that NUJ is one of the most important developments in international law in recent decades, it is surprising that its piracy origins has not received closer scrutiny.¹⁷

This Article challenges the generally accepted view that piracy was universally cognizable because of its heinousness. The Article shows that the rationale for piracy's unique jurisdictional status had nothing to do with the heinousness or severity of the offense. Indeed, piracy was not regarded in earlier centuries as being an egregiously heinous crime, at least not in the way that most human rights offenses are heinous. Thus piracy could not have become universally cognizable as a result of its perceived heinousness.

By showing that piracy cannot serve as a precedent for the new universal jurisdiction, this Article calls into doubt the entire line of cases that have used the piracy analogy to apply universal jurisdiction to a variety of heinous offenses. It suggests that courts and scholars have accepted the piracy analogy uncritically, thereby allowing NUJ to be built on a hollow foundation. This has several important implications for the future of NUJ because there is little historical precedent for NUJ, and there is reason to believe that it may lead to conflicts between states that the traditional jurisdictional rules sought to avoid. It also shows that the federal courts of appeals that have exercised NUJ are likely acting beyond their constitutional and statutory authorization. The Article concludes that supporters of NUJ must now find some other way to demonstrate that NUJ is in fact consistent with established principles of international jurisdiction and thus unlikely to provoke international conflict.

Part I begins by describing the rules of international jurisdiction and the special status those rules accorded to piracy. It then outlines the emergence of NUJ after World War II and its rapid expansion after the Cold War. Part I shows how NUJ was explicitly built on the precedent of piracy and explains the critical role the piracy analogy plays in justifying NUJ. It demonstrates that without the piracy analogy, the legitimacy and wisdom of NUJ would be questionable.

Part II, by putting piracy law in its legal and historical context, shows that piracy was not regarded as particularly heinous. The same behavior that pirates engaged in—armed robbery of civilian shipping—was often authorized and encouraged by every maritime nation in the form of privateering.

international human rights law and universal jurisdiction"); Michael P. Scharf & Thomas C. Fischer, *Foreword*, 35 NEW ENG. L. REV. 227, 228 (2001) ("Most scholars point to piracy as the first crime of universal jurisdiction recognized by the international community, and liken other crimes to piracy in order to justify, by analogy, the application of universal jurisdiction to those crimes.").

17. Some commentators have briefly noted that piracy does not appear to be significantly related to modern universal jurisdiction offenses. None have examined the question more closely. See JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 561 (2002) (observing that "the first international crime that states recognized—piracy—had little to do with human dignity at all [unlike modern human rights offenses]; rather, states sought to punish pirates as individuals because they were not (by definition) the agents of any states").

That activity differed from piracy only in that the privateer obtained from a sovereign a permit to rob and often split his proceeds with the sovereign. The fact that privateering was essentially state-sponsored piracy was clear to contemporary observers, yet it was a legal, and sometimes respectable, enterprise. The widespread tolerance and even encouragement of privateering indicates that historically there was a tolerance of sea robbery incompatible with the kind of universal repulsion that modern commentators claim motivated its universal cognizability.

Part III adduces more evidence that piracy was not regarded as extraordinarily heinous. It observes that piracy, by definition, was simply robbery at sea. It then shows that robbery has never been considered one of the most depraved crimes. While piracy was universally cognizable, many other far more repugnant offenses were not, further undermining the theory that heinousness was the rationale for piracy's jurisdictional treatment. Indeed, Part III shows that the specific offenses covered by NUJ have been considered extraordinarily heinous for many centuries: war crimes, genocide, and the like were always considered worse than sea robbery. Yet historically the law of nations failed to extend universal jurisdiction to those offenses.

Part IV considers the historical evidence that has been cited in support of the piracy analogy. It finds some of the historical sources unpersuasive and discusses one important source that refutes the piracy analogy. This Article only attempts to show that NUJ cannot be sustained on the basis of the argument on which it has been nourished: namely, that international law has always tolerated, and nations have always accepted, universal jurisdiction over heinous offenses. It does not attempt to present a comprehensive account of why piracy was treated as universally cognizable. Finally, this Article does not suggest that NUJ is normatively undesirable, nor does it challenge the revulsion at human rights offenses that inspires efforts to expand NUJ. There may well be another case to be made for NUJ that does not rely on the jurisdictional treatment of piracy,¹⁸ but that case has not been widely

18. For example, one might think that universal jurisdiction is valuable in that a country exercising such jurisdiction is more detached from the dispute, and thus more impartial, than a nation with the traditional jurisdictional connections. Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and U.S. Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 594 (2002) (describing the views of "liberal internationalist" supporters of international tribunals). On the other hand, greater detachment may lead to greater irresponsibility. In a more fanciful justification of universal jurisdiction, a few commentators have suggested that the presence of human rights offenders within a nation's territory causes a kind of inchoate harm to that nation's inhabitants, a moral pollution that injures the sensibilities of the inhabitants of any nation they set foot in. See INT'L L. ASS'N, Final Report, *supra* note 4 ("[In] the smaller world in which we live . . . people feel affronted not merely by crimes committed in their own territories or against their fellow citizens but also by heinous crimes perpetrated in distant states against others."); Blum & Steinhardt, *supra* note 10, at 86. Thus, when such a nation exercises universal jurisdiction over the offender, it redresses an injury it has directly suffered. Of course, this view implies that there is no such thing as universal jurisdiction because the prosecuting state would in fact be directly injured. Whether such an injury exists is highly debatable, and law does not normally redress such intangible harms.

accepted by courts and commentators. Until it has, the decisions, laws, and scholarship that rely on the piracy analogy must be critically reexamined.

I. PIRACY AS THE BASIS FOR MODERN UNIVERSAL JURISDICTION

This Part shows how the piracy analogy became the foundation for NUJ. It begins by describing the basic rules of international jurisdiction and explains how universal jurisdiction over piracy has historically been the sole exception to those rules. It then charts the extension of the piracy analogy to human rights offenses after World War II. Finally, it explains the important roles the piracy analogy plays in supporting and legitimizing NUJ.

A. Jurisdiction over Piracy

1. International Criminal Jurisdiction

International law regards criminal jurisdiction¹⁹ as a prerogative of sovereign states.²⁰ As a result, the traditional limits on national criminal jurisdiction are largely coextensive with the limits of national sovereignty.²¹ States obviously have territorial jurisdiction over offenses committed within their confines²² for control over territory is the hallmark of sovereignty. This principle also gives a nation jurisdiction over matters that take place on vessels that it has registered because they are treated as islands of a nation's territory outside its primary borders.²³

Furthermore, states sometimes have jurisdiction over offenses committed elsewhere, called extraterritorial jurisdiction. Since the extraterritorial conduct necessarily occurs within the territory of some other nation, extraterritorial jurisdiction will often involve competing jurisdictional claims between states.²⁴ The close relation between Westphalian sovereignty²⁵ and criminal jurisdiction means that one nation's attempt to exercise jurisdiction over persons or matters that also fall within the jurisdiction of another na-

19. "Jurisdiction" can refer to the power to lay down laws, the power to adjudicate, and the power to punish. This Article uses the term to encompass all those powers.

20. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998) ("The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has.").

21. See Bassiouni, *supra* note 10, at 89–90.

22. See BROWNLIE, *supra* note 20, at 303–04 ("Generally accepted and often applied is the objective territorial principle, according to which jurisdiction is founded when any essential constituent element of a crime is consummated on state territory.").

23. This corollary of the territorial principle is called "flag jurisdiction." See S.S. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10; OLIVER SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 250–52 (1991).

24. BROWNLIE, *supra* note 20, at 314 ("The same acts may be within the lawful ambit of one or more jurisdictions.").

25. See LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 9 n.** (1995) (explaining how the present system of international law, with its emphasis on sovereign and equal nation-states, originated with the Peace of Westphalia in 1648).

tion could be regarded as an usurpation of the second nation's sovereignty.²⁶ Such conflicting claims could "threaten the stability of the international legal order"²⁷ by seriously damaging relations between states,²⁸ leading to breakdowns of diplomatic relations,²⁹ trade boycotts,³⁰ and armed conflict. Extraterritorial jurisdiction seeks to prevent such problems by dividing jurisdictional responsibility among states in those situations where these responsibilities would likely overlap.³¹ Thus a nation can exercise extraterritorial jurisdiction over an offense only when it has a clear nexus with the offense that gives it jurisdictional priority over other nations.³² Under traditional rules of international jurisdiction, a sufficient nexus exists when the crime is committed by or against a country's nationals (respectively known as the nationality³³ and passive personality principles of jurisdiction).³⁴

A third, much more controversial and less widely used category of extraterritorial jurisdiction is the protective principle,³⁵ which gives a state jurisdiction over activities committed abroad that have caused harmful consequences in the prosecuting state. An antitrust conspiracy hatched abroad is the classic example. Protective jurisdiction is rarely invoked because, to the extent the activities abroad cause direct harm to citizens of the prosecuting

26. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 Reporters' note 8 (1987) (observing that "the exercise of criminal . . . jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive"). *See also* HENKIN, *supra* note 25, at 235 (explaining that when states exercise extraterritorial jurisdiction over their nationals residing in another state, the state with territorial jurisdiction often rightly feels aggrieved).

27. Bassiouni, *supra* note 10, at 90.

28. In recent example of this phenomenon, the United States threatened to cut off funding for a new NATO headquarters in Brussels unless Belgium repealed its universal jurisdiction law, under which President George W. Bush and U.S. generals had recently been charged. *See* Vernon Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, WASH. POST, June 13, 2003, at A24. Cf. Bart Crols, *Belgium to Mend Ties with Washington: PM Verhofstadt Offers to Halt Debate on Iraq*, REUTERS, Sept. 2, 2003 (quoting Belgian Prime Minister Verhofstadt as hoping that his nation's elimination of its universal jurisdiction provision would help mend relations damaged by the law, which he conceded had been "politically abused"). In another example, the Tutsi-controlled Rwandan government has largely broken off contact with the International Criminal Tribunal for Rwanda (ICTR) over its investigation of war crimes committed by the Tutsi-dominated Rwandan army. *See* U.N. *Tribunal Invites Rwanda for Talks on Strained Relations*, AGENCIE FRANCE-PRESSE, Oct. 30, 2002.

29. *See, e.g.*, Herb Keinon, *Ambassador Recalled to Protest Belgian Decision on Sharon*, JERUSALEM POST, Feb. 13, 2003, at 1.

30. *See, e.g.*, Leslie Susser, *The Belgians Have Gone Crazy*, JERUSALEM REPORT, Mar. 10, 2003, at 56 (quoting Israeli Foreign Ministry Legal Adviser Alan Baker as contemplating trade boycotts and other retaliatory measures if Belgium continues to use universal jurisdiction).

31. *See* BROWNIE, *supra* note 20, at 313–14 (discussing principles to be followed by nations in exercising extraterritorial jurisdictions, such as non-intervention, accommodation, mutuality, and proportionality).

32. *See id.* at 313 ("[T]here should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction.").

33. *See id.* at 306 ("Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extraterritorial acts."). *See also* HENKIN, *supra* note 25, at 236–38 (discussing state authority to "prescribe law for its nationals even when they were outside its territory").

34. *See id.* at 239 (noting a "state's interest in seeking to protect its nationals when they are abroad by applying its law to persons who injure them").

35. *See* BROWNIE, *supra* note 20, at 307. *See also* HENKIN, *supra* note 25, at 238–39 (defining the protective principle).

nation, jurisdiction can be invoked simply through the passive personality principle.³⁶ If, however, the harm is diffuse or indirect and involves the general interests of a nation, then the protective principle threatens to justify extraterritorial jurisdiction in a large and vague class of cases, making the division of jurisdictional authority between sovereign states uncertain and generating numerous opportunities for interstate conflict.

2. Piracy as Jurisdictional Exception

For as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century), any nation could try any pirates it caught, regardless of the pirates' nationality or where on the high seas they were apprehended.³⁷ The law of nations also permitted any nation that caught a pirate to summarily execute him at sea.³⁸ Some commentators have mistakenly suggested that universal jurisdiction existed merely because the traditional jurisdictional categories did not cover piracy. The high seas lay outside the territorial jurisdiction of any nation, a global commons. But the ships that pirates attacked were registered in a particular nation and thus were within that nation's flag jurisdiction; those on board the victim ship were nationals of some state and hence within its passive personality jurisdiction. Thus the locus of piracy did not render standard jurisdictional rules inapplicable.

Today, international law continues to regard piracy as universally cognizable.³⁹ The legitimacy of universal jurisdiction over piracy throughout the past several hundred years has been recognized by jurists and scholars of every major maritime nation.⁴⁰ Indeed, it is hard to find any authority challenging the universal principle as applied to piracy.

36. See BROWNLIE, *supra* note 20, at 304 n.14. For other examples in which the protective principle is applied, see also HENKIN, *supra* note 25, at 238.

37. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *71 (observing that "every community" has a right to punish pirates); Randall, *supra* note 10, at 791. The laws of piracy and privateering were essentially uniform across maritime nations and in international law in the eighteenth and nineteenth centuries. See DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF THE FIGHTING SAIL* 5 (1999); Bassiouni, *supra* note 10, at 109–10. None of the minor differences bear upon the arguments of this Article. This Article draws mostly on Anglo-American cases and sources from the eighteenth and nineteenth centuries, which are more readily available and do not require translation. Also, this Article pays particular attention to the problems of universal jurisdiction in U.S. federal courts, thus making the American precedents particularly relevant.

38. See JAMES KENT, *COMMENTARIES*, in 3 *THE FOUNDERS' CONSTITUTION* 87 (Phillip B. Kurland & Ralph Lerner eds., 1987) (observing that "every nation has a right to attack and exterminate" pirates).

39. See Convention on the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 450 U.N.T.S. 6465; see also United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, S. TREATY DOC. NO. 103-39 (1994), 1833 U.N.T.S. 3 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest the persons and seize the property on board . . . [and] may decide upon the penalties to be imposed.").

40. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (noting "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever").

The crime of piracy consists of nothing more than robbery at sea.⁴¹ Most authorities describe piracy as actions at sea that would be punishable as robberies if committed on dry land.⁴² Moreover, the plunder must be undertaken without the permission of a sovereign state,⁴³ and be taken on the high seas—that is, outside of territorial waters. The absence of any of these elements would be fatal to a piracy prosecution and would preclude the exercise of universal jurisdiction.

The punishment of piracy fell to individual nations, which enacted piracy laws to implement the international law norm. While national measures varied slightly in their definitions of the offense, the common parameter was unlicensed robbery on the high seas.⁴⁴ States could, of course, by statutory fiat call any conduct “piracy,”⁴⁵ and the word was sometimes imprecisely applied to an array of maritime offenses having nothing to do with robbery on the high seas.⁴⁶ But it was always clear that whatever the content of a nation’s piracy statutes, universal jurisdiction would only exist over acts that fell within the law of nations’ definition of piracy.⁴⁷

41. *See id.* (“Whether we advert to writers on the common law, or the maritimo [sic] law, or the law of nations, we shall find that . . . its true definition by the law is robbery upon the sea. . . . We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery on the sea.”); *Dole v. New Eng. Mut. Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (“[R]obbery on the high seas is piracy under the law of nations by all authorities.”); *Fitfield v. Ins. Co. of Pa.*, 47 Pa. 166, 187 (1864) (“A pirate, according to the most approved definitions, is a sea robber.”); *HM Advocate v. Cameron*, 1971 S.L.T. 202, 205 (H.C.J. 1971) (“The essential elements of this crime are no more and no less than those which are requisite to a relevant charge of robbery where that crime is committed in respect of property on land and within the ordinary jurisdiction of the High Court.”); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *72 (“The offence of piracy . . . consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there.”); *KENT, supra* note 38, at 87 (“Piracy . . . is the same offense at sea with robbery on land; and all the writers on the law of nations, and on maritime law of Europe, agree in this definition of piracy.”). In *Smith*, Justice Story’s encyclopedic “footnote h” on the definition of piracy in the law of nations collects scores of common and civil law sources for this proposition; the judges and commentators all concur that only the locus of the crime separates piracy from ordinary robbery, and that indeed, piracy is but a species of robbery. *Smith*, 18 U.S. at 163 n.h. (citing, e.g., *Rex v. Dawson*, 8 William III, 1696, 5 *State Trials*, 1st ed. 1743 (“Now piracy is only a sea term for robbery, piracy being a robbery committed while in the jurisdiction of the admiralty.”)).

42. *See, e.g., Dole*, 7 F. Cas. at 846 (“Standard writers upon criminal law in defining piracy say it ‘consists in the committing of those acts of robbery and depredation upon the high seas which, if committed on the land, would have there amounted to a felony.’” (quoting 1 Russ. Crimes (Shars. Ed.) 94; 2 Whart. Cr. Law (5th Ed.) § 2830, p. 541; 4 Bl. Comm. 72; 2 East P.C. 796; 1 Hawk P.C. c. 37, § 4)).

43. *Smith*, 18 U.S. at 163 n.h. (“Piracy, according to the law of nations, is incurred by depredation on or near the sea, without authority from any prince or state.” (quoting Woodeson, *Lect. 34* vol. 2,422)).

44. *See Randall, supra* note 10, at 794–95.

45. *See* 4 WILLIAM BLACKSTONE, *COMMENTARIES* *72 (listing various offenses that “by statute . . . are made piracy also” and distinguishing them from the general international law definition of piracy); ALFRED P. RUBIN, *THE LAW OF PIRACY* 213 (2d. ed. 1998); S.S. *Lotus*, 1927 P.C.I.J. at 70 (Moore, J., dissenting) (“[T]he municipal laws of many States denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations.”).

46. Today, “piracy” is commonly used in a colloquial sense to refer to infringement of intellectual property rights (e.g., software “piracy”). Like the earlier loose usages, this one has nothing to do with piracy in international law.

47. *See Dole*, 7 F. Cas. at 847 (“By statutes passed at various times . . . many artificial offenses have been created which are deemed to be amounted to piracy But piracy created by municipal statute

Universal jurisdiction over pirates applied to both civil and criminal proceedings.⁴⁸ When a pirate ship was captured and brought into port, where the ship and its accoutrements would be sold in a prize proceeding, those robbed by the pirates could bring suit in admiralty court requesting compensation from the proceeds of the sale.⁴⁹ These salvage suits could be brought even when there was no nexus between the pirates, their victims, and the jurisdiction where the salvage was held.⁵⁰

However, universal jurisdiction over pirates was more a matter of theory than of practice. As Professor Rubin has shown in his authoritative history of piracy law,⁵¹ very few criminal prosecutions for piracy can be found that depended on the universal principle. Moreover, some nations, such as the United States, did not allow their courts to exercise universal jurisdiction over piracy.⁵² Universal jurisdiction was an option, not a duty. Despite their endorsement of universal jurisdiction over pirates, the major maritime nations openly tolerated even large-scale piracy when it was directed at their enemies.⁵³ Still, commentators have always supported the existence of universal jurisdiction,⁵⁴ and for the past several centuries the right of any nation to prosecute any pirate has, as an abstract proposition, gone unchallenged.⁵⁵

3. Slavery

Some courts and commentators mention slave trading in the same breath as piracy as an example of a universal offense in existence before the post-war

can only be tried by that state within whose territorial jurisdiction, on board of whose vessels, the offence thus created was committed."); Randall, *supra* note 10, at 795–96.

48. *See, e.g.*, The Ambrose Light, 25 F. 408, 415–16 (D.C.N.Y. 1885) (observing, in a libel for piracy, that "piracy has two aspects"—one a "violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel," and the other being criminal punishment "by the municipal law of the place where the offenders are tried").

49. *See* BROWNLIE, *supra* note 20, at 237 ("[T]he rightful owner is not deprived of his title by virtue of acts of piracy relating to his goods.").

50. *See La Jeune Eugenie*, 26 F. Cas. at 843 ("No one can doubt, that vessels and property in the possession of pirates may be lawfully seized on the high seas by any persons, and brought in for adjudication.").

51. *See* RUBIN, *supra* note 45, at 302, 348 n.50 (concluding that universal jurisdiction over piracy has been applied "very few times," and enumerating fewer than five cases in the past 300 years). However, these five cases were certainly not the only ones. Many more cases were unreported in the seventeenth and eighteenth centuries than today. Reporters would be particularly uncommon in remote ports. Furthermore, the reported cases obviously do not include summary proceedings at sea, where pirates could be sunk or hanged upon apprehension. *See* Texas v. Johnson, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting) (observing that in the eighteenth century, captured pirates could be summarily hanged by the British).

52. *See, e.g.*, United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631–34 (1818) (Marshall, C.J.) (holding that statute criminalizing piracy did not give federal courts universal jurisdiction).

53. *See* Violet Barbour, *Privateers and Pirates of the West Indies*, 16 AM. HIST. REV. 529 (1911) (describing how Britain and Spain occasionally turned a blind eye to piracy when it suited their interests).

54. *Cf.* Bassiouni, *supra* note 10, at 153 ("The writings of scholars have driven the recognition of the theory of universal jurisdiction.").

55. *See* Research in International Law: *Jurisdiction with Respect to Crime (Universality—Piracy)*, 29 AM. J. INT'L. L. 563, 564 (Supp. 1935) ("Jurists who have written on the jurisdiction of crime are practically unanimous in affirming the competence [of any nation to punish pirates].").

development of NUJ.⁵⁶ However, historical evidence does not support this view. At most, international treaties on slave trading created "delegated jurisdiction"⁵⁷ whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offense, effectively making each state an agent of the others. Since such arrangements rest on state consent and the traditional jurisdiction of each state party to the agreements, they in no way challenge the Westphalian jurisdictional system and cannot be considered as examples of universal jurisdiction. Hence, the only precedent for NUJ must be found, if anywhere, in the treatment of piracy.

No state practice supports universal jurisdiction over slave trading.⁵⁸ However, a series of nineteenth-century treaties has led to the misconception that slave-trading was universally cognizable. In the nineteenth century, Britain and the United States, as well as a few other nations that had banned the slave trade, entered a series of treaties that allowed any of the parties to punish each other's slavers, and set up international tribunals to hear such cases. The use of formal treaties shows that international custom did not recognize a right of "third-party" nations to prosecute slave traders.⁵⁹ Con-

56. See, e.g., *Filartiga*, 630 F.2d at 890; Randall, *supra* note 10, at 788 ("Piracy and slave trading are the prototypal offenses that any state can define and punish."); Kirby, *supra* note 10 ("Universal jurisdiction . . . can be traced to the early responses of the law of nations to piracy and slavery.").

57. Such arrangements have been described as "delegated universal jurisdiction." Strapatsas, *supra* note 3, at 7 (defining it as the situation that occurs when "the original judicial competence over a crime belongs to another State, that either renounces it, yields, or delegates its jurisdiction in favour of the State where the perpetrator is found."). While this definition is good, the term is misleading. It is not universal jurisdiction that is being delegated—it is territorial and other traditional types of jurisdiction that are being delegated. Delegated jurisdiction can only become "universal" if *all* nations make irrevocable jurisdictional grants to *all* other nations.

58. Cf. Bassiouni, *supra* note 10, at 114. Supporters of NUJ cite Justice Story's tangled opinion in *La Jeune Eugenie* in support of the proposition that the law of nations made slavery universally cognizable because of its heinousness. Story, however, points to no case exercising universal jurisdiction over slave traders. Indeed, he refuses to exercise universal jurisdiction over the *La Jeune Eugenie*. The case involved a French-flagged ship with a French crew, seized by a U.S. ship for its participation in the transatlantic slave trade that American law had banned. Story found that the ship was in fact American and its papers were a ruse to avoid American jurisdiction. See 26 F. Cas. at 84. Moreover, the statute under which the ship was to be condemned only banned importation of slaves to the United States, and thus stood for at most a protective principle of jurisdiction; slave trading between other nations was not regulated. To be sure, Story argued, in dicta, that slave trading was against "universal law." *Id.* at 851. However, he had to acknowledge that the "law of nations" had not necessarily caught up to the true higher law: many Christian nations continued to allow the slave trade. *Id.* at 846–48.

The resolution of the case underscores Story's fundamental opposition to the exercise of universal jurisdiction, even over heinous crimes. He ordered the vessel returned to the King of France, whose ministers had been demanding it, "to be dealt with according to his own sense of duty and right." *Id.* at 851. For even though the slave trade was an "odium" characterized by "atrocious and unfeeling cruelty," American courts "are not hungry after jurisdiction in foreign causes," which the high-level French interest in the case had made it. *Id.* For Story, even the most heinous crime did not warrant the interference with international relations that would result from universal jurisdiction.

59. Some slave-trading treaties analogized slave trading to piracy. See, e.g., Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, art I, 92 Consol. T.S. 437, 441 (declaring slave trafficking to be piracy). These treaties appear to use the word "piracy" colloquially as a term of opprobrium for crime, particularly maritime crime. Such loose usage carries no implication of universal jurisdiction. See *supra* note 46.

temporary lawyers would clearly have regarded such jurisdictional treaties as an acknowledgment of the absence of universal jurisdiction over slave trading. And since none of the treaties provided for universal jurisdiction, they could hardly be the germ of such a custom.⁶⁰ Furthermore, if the signatories intended to take a step toward making slave trading a universal offense, their move did not win broad assent, in part because important maritime powers like Spain still had a legal slave trade.

Indeed, the legality of slave trading in several important states at the time of these treaties demonstrates that it was not subject to universal condemnation, and thus an unlikely candidate for international criminality, let alone for universal jurisdiction. To be sure, the longstanding prohibition of slavery by every nation would be an argument for adding slave trading to the roster of universal offenses today, on the same heinousness principle that is said to justify the addition of torture and the other offenses of NUJ.⁶¹ But this would not make it a *precedent* or *historical example* for NUJ.

B. NUJ Adopts the Piracy Analogy

1. Nazi War Crimes Tribunals

Piracy's status as the sole universally cognizable offense changed after the Second World War.⁶² The victorious powers wanted to prosecute Axis lead-

60. See Morris, *supra* note 5, at 341 n.7; Randall, *supra* note 10, at 798 nn.78–79. Bassiouni concedes that at most “a few” of the treaties “establish universal jurisdiction or allow a state to exercise it.” Bassiouni, *supra* note 10, at 112. The treaty language he cites, however, is far from explicit in establishing universal jurisdiction; it says merely that one nation can arrest and try slave traders “who have escaped from the jurisdiction of the authorities where the crimes or offenses were committed.” *Id.* at 112 n.110. The treaty does not state that it applies to non-signatory states. Since treaties only apply to their signatories, this passage appears to do nothing more than delegate jurisdiction. Furthermore, nowhere does the treaty say that the nation apprehending the slave trader can, as they could under universal jurisdiction principles, prosecute him over the protest of nations with territorial or national jurisdiction.

61. Many of the modern authorities that contend slave trading is a universal offense seem to mean that it has become one after the Second World War, in the same way torture and genocide have, not that it was universally cognizable in the nineteenth century. See, e.g., Randall, *supra* note 10, at 798–99 n.79. Those who consider slavery a universal offense primarily rely on documents of recent vintage, such as the 1980s law of the seas conventions. The Restatement (Third) of Foreign Relations Law § 404 (1987) says slavery is a universal offense but cites no state practice whatsoever to support its opinion. For a skeptical view of slavery's universal status, see Roger Clark, *Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 390 n.55 (1999).

62. Some tentative steps were taken between the two world wars that can be viewed as attempts to link war crimes to piracy. The 1922 Washington Treaty on arms control, aimed particularly at controlling submarine warfare and signed by the United States, Britain, France, Italy, and Japan, declared the destruction of manned merchant ships to be a violation of the rules of war, and the perpetrator of such acts could be punished “as if for an act of piracy” by “any Power” that catches him. Some commentators see this treaty as the first attempt to shoehorn other crimes into the unique jurisdictional position occupied by piracy. See RUBIN, *supra* note 45, at 316–17.

It is more likely that the treaty had nothing to do with universal jurisdiction at all, and the comparison to piracy was meant to illustrate the wickedness of the offense, not its jurisdictional status. Like all treaties, it applied only to signatory states, and thus (like the earlier slave trading treaties) had nothing to do with universal jurisdiction. The “any Power” referred to is any signatory power.

Moreover, the context from which treaties emerged makes it unlikely that universal jurisdiction was on

ers for their unprecedented atrocities. Yet because not all of the crimes in question were committed against the Allied nations, it was not clear whether the Allies had, under the traditional jurisdictional rules, a sufficient connection to prosecute all the Nazi crimes.⁶³ Thus several of the Allied tribunals justified their proceedings through universal jurisdiction.⁶⁴ The tribunals cited piracy as an example of the “Universality of Jurisdiction,” and claimed that this “general doctrine” encompassed war crimes as well.⁶⁵ This represents the first judicial use of the piracy analogy in support of universal jurisdiction over crimes other than piracy.⁶⁶

The tribunals’ authority could have been sustained without universal jurisdiction,⁶⁷ and the tribunals themselves clearly believed their jurisdiction could be sustained on multiple other grounds.⁶⁸ The most promising of these was “delegated territoriality” jurisdiction. As the effective sovereigns of the defeated lands, the Allies were successors-in-interest to Germany’s sovereign power to prosecute offenses committed on its soil or by its citizens.⁶⁹ The Nuremberg Tribunal apparently took this delegated sovereignty view of its own jurisdiction.⁷⁰ Of course if the tribunals were to sit today, they would easily find the universal principle to be a sufficient basis for jurisdiction: American Article III courts have since ruled that universal jurisdiction

the drafters’ minds. During the war, many Allied leaders had described Germany’s unrestricted submarine warfare as “illegal,” and called for post-war prosecution of the officers responsible. *See* GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 60–62, 72–73, 94–99 (2000). None of these plans seemed to envision universal jurisdiction but rather trial at the hands of the nations whose ships had been sunk. The degree to which each Allied nation cared about the matter and was prepared to expend its political capital on securing such trials was in direct proportion to how much it had suffered from torpedoes. In any case, the treaty failed to explain the similarity between war crimes and piracy, which, as Rubin notes, “is not evident.” *See* RUBIN, *supra* note 45, at 317. Like the slave-trading treaties, “piracy” as used in the submarine agreements may be simply a non-technical, emotionally charged term of opprobrium for maritime crimes. *Cf. id.* at 317 n.14, 319–20. A definitive interpretation does not exist, as the provision was never applied against a submariner. *Id.* at 317.

63. *See* Randall, *supra* note 10, at 802–03 (summarizing the variety of charges brought against war criminals and mentioning many that would not have violated domestic law when committed and that could only be prosecuted by the Allies under a universal theory).

64. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (“It is generally agreed that the establishment of these tribunals [the International Military Tribunal and the zonal tribunals run by particular Allied countries] and their proceedings were based on universal jurisdiction.”); Randall, *supra* note 10, at 806–10 (citing tribunal cases that invoke universal principle). The International Military Tribunal made at best a vague and cursory reference to the universal principle, and clearly saw its jurisdiction as based on other principles. However, the military courts set up by Britain and the United States in the areas of Europe that those countries occupied specifically invoked the universal concept in several cases.

65. 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42 (1947) (Brit. Mil. Ct. Almelo).

66. *See* Morris, *supra* note 5, at 345 (finding invocation of the piracy precedent by post-war tribunals “unsurprising” because “no specific precedent” existed for trying foreign nationals for war crimes committed against other foreigners).

67. *See, e.g.*, BROWNLEE, *supra* note 20, at 308.

68. *See id.* at 565–68.

69. Morris, *supra* note 5, at 344; Randall, *supra* note 10, at 806.

70. International Military Tribunal (Nuremberg), Judgment (Sept. 30, 1946), in *CRIMES OF WAR* 96 (Richard A. Falk et al. eds., 1971).

diction—based on the piracy analogy—allows any nation, not just the victorious Allies, to prosecute Nazi war crimes.⁷¹

2. *Eichmann*

The next step in the development and expansion of modern universal jurisdiction was Israel's prosecution of the Nazi war criminal Adolf Eichmann. The District Court found support for its jurisdiction in the universal principle, which it discussed at some length and traced back to piracy.⁷² The Israeli Supreme Court placed even greater reliance on the universal principle. In doing so, it discussed piracy as a precedent for modern universal jurisdiction at greater length than did the Allied tribunal cases.⁷³ Indeed, the Court justified its exercise of universal jurisdiction almost exclusively on the basis of the piracy analogy: it concluded its jurisdictional discussion by saying “the substantive basis upon which the exercise of the principle of universal jurisdiction in respect of the crime of piracy rests justifies its exercise in regard also to the crimes which are the subject of the present case.”⁷⁴ The Supreme Court explicitly recognized the need for a principle to connect piracy with modern universal offenses. It observed that universal jurisdiction over piracy had wide support in international law, but that there was at the time no consensus about its application beyond that offense.⁷⁵ Justice Agranat⁷⁶ recognized that unless a general principle could be extracted from the piracy precedent, universal jurisdiction would be vulnerable to the argument that nothing but piracy could be regarded as a universal offense.⁷⁷ The Court maintained that piracy is merely an example of a broader principle of universal jurisdiction.

Under that broader principle, universal jurisdiction extends to heinous acts that “damage vital international interests; they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law

71. See, e.g., *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 556 (N.D. Ohio 1985) (“Piracy is the paradigm of an offense ‘against the common law of nations.’ . . . The principle that the perpetrators of crimes against humanity and war crimes are subject to universal jurisdiction found acceptance in the aftermath of World War II.”), *aff’d sub nom. Demjanjuk*, 776 F.2d 571. See also, HENKIN, *supra* note 25, at 246–47 (explaining that international law has overcome limitations on exercising jurisdiction over certain “offenses of ‘universal concern,’ such as genocide and war crimes”).

72. *Eichmann*, 36 I.L.R. at 287–92, 298–304.

73. See Randall, *supra* note 10, at 810.

74. *Eichmann*, 36 I.L.R. at 300.

75. As the court wrote:

One of the principles whereby States assume in one degree or another the power to try and punish a person for an offence is the principle of universality. Its meaning is substantially that power is vested in every State regardless of the fact that the offence was committed outside its territory by a person who did not belong to it, provided he is in it when brought to trial. This principle has wide currency and is universally acknowledged with respect to the offence of piracy *jure genitum*.

Id. at 298.

76. The opinion was issued per curiam, but the jurisdictional sections had been assigned to and were drafted by Agranat. See PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 150 (1997).

77. *Eichmann*, 36 I.L.R. at 299–300.

systems adopted by civilized nations.”⁷⁸ Piracy was cited as the “classic” example of such an offense.⁷⁹ Justice Agranat briefly suggested that piracy satisfied the first criterion—damaging international interests—because all nations had an interest in protecting international commerce.⁸⁰ But he failed to explain how piracy satisfied his other criterion for universal jurisdiction—the moral heinousness of the act. Thus the central premise of the piracy analogy remained unexplained.

Ironically, Israel did not need universal jurisdiction to prosecute Eichmann, and Israel’s jurisdiction could be seen as resting on particular, rather than universal, grounds because of its unique connection to the offense. Israel was the sole sovereign representative of the Jewish people, as well as the nation where many of the victims took refuge.⁸¹ Furthermore, punishment of the massive violence against the Jewish peoples which antedated the creation of Israel could have been useful in deterring future genocides, thus rendering the prosecution a form of protective jurisdiction. Indeed, the charges against Eichmann show that Israel regarded itself as having a direct jurisdictional connection to Eichmann and his crimes. Eichmann was convicted of “crimes against the *Jewish* people” as well as “crimes against humanity,” convictions that Israeli society and the district court regarded as distinct offenses.⁸² Indeed, the district court sustained this parochial Jewish jurisdiction,⁸³ but, like the Supreme Court, also argued for the existence of universal jurisdiction. Thus even if the Supreme Court was right about universal jurisdiction existing for Eichmann’s crimes, the jurisdiction actually used by the nation that apprehended, tried, and executed him was not universal.

3. National Courts and International Tribunals

NUJ grew more in the 1990s than in any previous period. The number of universally cognizable crimes increased, and courts in the United States and elsewhere became increasingly willing to invoke universal jurisdiction. Entire courts were created whose jurisdiction could be justified only under the universal principle.

It is not an accident that NUJ had its first bloom in the years after the Second World War, and then a second and even grander flowering in the

78. *See id.* at 291.

79. *Id.* at 292.

80. *Id.*

81. REYDAMS, *supra* note 15, at 160 (observing that “there are ample links between Israel and World War II crimes”).

82. *Id.* (emphasis added); LAHAV, *supra* note 76, at 149, 153 (discussing role of Jewish-specific charge in the Eichmann case and noting that decision to charge him with the offense was widely criticized at the time by international observers).

83. This can be seen as a de facto variant of passive personality jurisdiction. The murdered Jews were not Israeli citizens, though they would have been eligible for citizenship had Israel existed at the time. *See* PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 2, at 42 & n.7 (suggesting that Eichmann was not an example of “pure” universal jurisdiction” because of the passive personality dimension).

1990s.⁸⁴ During both periods, the international balance of power was relatively depolarized. In the wake of World War II, the two new superpowers found themselves momentarily on the same side. Once the Cold War began, however, any exercise of NUJ inevitably would have been dismissed as a politically motivated attack by one great power or its allies against the other side. A divided world is not conducive to the development of principles that diminish sovereign power.⁸⁵ With the end of the Cold War, however, only one great power remained, and many European nations saw themselves as more or less united (as evidenced by the expansion of the European Union and its powers). Thus, one might expect NUJ to prosper until a new global power emerges to challenge the supremacy of the United States and its allies.

In the decade after the Cold War, nations exercised universal jurisdiction in perhaps more cases than during the entire preceding century.⁸⁶ Many European nations began using their domestic courts to prosecute war crimes and similar offenses.⁸⁷ Some countries have recently adopted statutes specifically authorizing universal jurisdiction.⁸⁸ Unlike cases where universal jurisdiction was previously asserted, some of the NUJ cases involve offenses committed in nations where government authority had not collapsed,⁸⁹ though the majority continue to arise from “failed states” such as Yugoslavia and Rwanda. The trend has been toward ever broader assertions and exercises of universal jurisdiction by European states, though the recent retreat by Belgium may mark the beginning of a reaction against national prosecu-

84. Cf. Morris, *supra* note 5, at 338 (describing the history of universal jurisdiction as “long quiescent periods” punctuated by “flurries of activity”).

85. Even if the exercise of universal jurisdiction is not an instrumental choice, but a consumption activity (that is, some elites might have a “taste” for all things universal, including universal jurisdiction, see Anderson, *supra* note 18, at 595), it would be too expensive a taste to indulge during the Cold War, when the objects of the jurisdiction could often turn out to be the client states of a hostile superpower.

86. See REYDAMS, *supra* note 15, at 221 (“Until recently, the number of cases in which states exercised universal jurisdiction . . . was negligible. In the past ten years, however, some twenty cases of universal jurisdiction have been reported.”). Of course, good data on earlier universal jurisdiction cases are elusive. See *supra* note 51. It is certainly safe to say that the 1990s saw more universal jurisdiction cases than any previous decade. See Randall, *supra* note 10, at 839–40 (observing that in 1988, despite the expansion of the universal principle, states rarely “actually exercise universal jurisdiction”).

87. For an up-to-date survey of universal jurisdiction prosecutions and legislation in the European states as well as some others, see REYDAMS, *supra* note 15, at 81–210. The dominant role of Western European nations in the growth of NUJ might lend some support to the somewhat jocular observation that the establishment of international tribunals exercising universal jurisdiction is “not a policy choice, but rather a cultural preference, more akin to a dietary taste or a religious choice than an argument deduced from empirical reason.” Anderson, *supra* note 18, at 595. A better explanation for the leading role of these states is that nations will only exercise universal jurisdiction if they do not fear retaliation by the defendant’s home country.

88. See, e.g., Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire [Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (as amended in 1999)], 38 I.L.M. 918 (1993) (Belg.).

89. See, e.g., Glenn Frankel, *Denmark Charges Hussein Foe With War Crimes*, WASH. POST, Nov. 20, 2002, at A17 (reporting on arrest and indictment by Danish authorities of former Iraqi general, accused by Danish prosecutors of genocidal acts against Kurds in Iraqi territory).

tions.⁹⁰ Or it may simply suggest that European countries are unwilling to press universal jurisdiction cases against nationals of more powerful states.⁹¹

It is difficult to determine the degree to which these national assertions of universal jurisdiction rely specifically on the piracy analogy because European courts do not always issue reasoned opinions. It seems safe to assume that the piracy analogy at least implicitly informs these prosecutions. Europe's increased use of universal jurisdiction has been stimulated by *Eichmann*,⁹² the International Criminal Tribunal for the Former Yugoslavia (ICTY), and *Filartiga*, all of which explicitly relied on the piracy analogy.⁹³

Another move in the development of NUJ was the establishment, by the U.N. Security Council, of tribunals to hear cases arising from atrocities committed during the Yugoslav⁹⁴ and Rwandan civil wars. The international tribunals were inspired by the example of the Allied war crimes tribunals. Like its predecessors, the ICTY has also drawn on the piracy analogy to justify universal jurisdiction over heinous crimes, citing it as an example of jurisdiction over offenses that "shock the conscience of mankind."⁹⁵

The NUJ cases of recent years, in both national and international tribunals, rely on universal jurisdiction in a purer sense than their predecessors did. The Allied tribunals after World War II could have plausibly invoked other jurisdictional grounds, which may explain why they casually introduced the piracy analogy without analysis. The Allies, as the occupying power and victorious force, had a unique stake in dealing with the war crimes committed by the defeated Nazis. Similarly, Israel prosecuted Eichmann not because it had a general interest in punishing massive human rights offenses, but because it had a unique and specific claim as the sole sovereign representative of the Jewish people. The U.N. tribunals, on the other hand, sit out-

90. See Patrick Lannin, *Belgium to Scrap War Crimes Law*, WASH. POST, July 13, 2003, at A19 (reporting Belgium's announcement that it will revise war crimes law to limit jurisdiction to cases involving Belgian citizens or residents).

91. See *id.* (reporting that Belgium's elimination of universal jurisdiction was a response to cases brought against Israeli Prime Minister Ariel Sharon, British Prime Minister Tony Blair, and U.S. President George W. Bush).

92. *Eichmann*, with its incomplete piracy analogy, served as precedent for other important universal jurisdiction cases. See REYDAMS, *supra* note 15, at 161 ("For lack of other precedents, [Eichmann] was for a long time at the centre of any discussion on universal jurisdiction"). See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.3) [2000] 1 A.C. 147, 273–76 (Millet, L.) (discussing *Eichmann* as a "landmark decision . . . of great significance" in validating universal jurisdiction over non-piratical crimes); *Polyukhovich v. The Commonwealth* (1991) 172 C.L.R. 501, 661–62 (en banc) (Aust.).

93. Some foreign courts in the 1990s have certainly endorsed the piracy analogy. See *Polyukhovich*, 172 C.L.R. at 565 (en banc) (relying on piracy analogy to support holding that international and Australian law recognizes universal jurisdiction over war crimes, and that Australia's 1945 War Crimes Act empowers its courts to exercise such jurisdiction).

94. See S.C. Res. 827, U.N. Doc. S/Res/827 (1993) (establishing international tribunal with jurisdiction to prosecute "violations of international humanitarian law committed in the territory of the former Yugoslavia").

95. *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (Oct. 2, 1995); See also *Furundzija*, Case No. IT-95-17, at ¶ 147 (invoking the piracy analogy to establish that torture has joined piracy as a subject of universal jurisdiction).

side of the nations with whose crimes they deal, operate without the consent of the nations whose crimes they adjudicate, and were created by powers that were not parties to the underlying conflicts.⁹⁶ Similarly, the national NUJ prosecutions of the 1990s took place in countries with no direct and differentiable stake in the perpetrator, victim, or offense.

The creation of the International Criminal Court (ICC)—inspired by the Nazi war crimes tribunals and the *ad hoc* international tribunals established in the 1990s—may prove to be the most important step yet in the expanded use of universal jurisdiction.⁹⁷ The ICC, which sits in The Hague, was created by a treaty that has been signed and ratified by ninety-two states. It is given the power “to exercise its jurisdiction over persons for the most serious crimes of international concern.”⁹⁸

Whether the Rome Statute that created the ICC confers universal jurisdiction is unclear. The Rome Statute largely limits the ICC’s jurisdiction to offenses that occurred on the territory of a signatory state or were committed by a national of a signatory state.⁹⁹ Jurisdiction is given to the ICC by a delegation of traditional Westphalian jurisdiction by the member states (as with the slave trading and submarine warfare agreements), and thus no universal jurisdiction issues arise under these provisions. However, the ICC’s charter makes one exception to the jurisdictional constraint. When a case is referred to the ICC by the U.N. Security Council instead of by a member state or the prosecutor, the territorial and nationality limitations do not apply.¹⁰⁰ Thus, it appears that the ICC can have jurisdiction over crimes committed in non-signatory states by and against nationals of non-signatory states if the charges are raised by the Security Council. Because the court’s charter does not grant universal jurisdiction in express terms, the compatibility of NUJ with the mandate of the ICC remains uncertain and controversial.¹⁰¹ Nor is it clear whether the ICC intends to assert such jurisdiction and

96. The Rwandan tribunal was originally favored by the Tutsi rebels who overthrew the Hutu government that had launched the genocide. Samantha Power, *Rwanda: The Two Faces of Justice*, N.Y. REV. BOOKS, Jan. 16, 2003, at 47. But at the U.N. Security Council, Rwanda voted against the creation of the tribunal because it would take jurisdiction of the most important defendants but would not sentence anyone to death. BASS, *supra* note 62, at 307. Since then, relations between the Tutsi-led government and the tribunal have all but collapsed because the court prosecutes Tutsis as well as Hutus. The government has taken to blocking witnesses from attending court sessions. Power, *supra*, at 48.

97. Rome Statute of the International Criminal Court, arts. 5–8, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998) (establishing court with “international legal personality”).

98. *Id.* art. 1.

99. *Id.* art. 12(2) (a)–(b).

100. *Id.* arts. 12(2), 13(b).

101. According to former U.S. Ambassador-at-Large for War Crimes, many of the drafters of the Rome Statute intended to allow the ICC to exercise universal jurisdiction, although the United States was opposed:

The theory of universal jurisdiction for genocide, crimes against humanity and war crimes seized the imagination of many delegates negotiating the ICC treaty. They appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts to prosecute any individuals, including non-nationals, who commit . . . these crimes.

risk resistance from non-signatories such as the United States. Whether the ICC's judges and prosecutors accept the piracy analogy may influence its willingness to exercise universal jurisdiction.

One might think that the ICC's jurisdiction in non-signatory cases forwarded to it by the Security Council should also be considered as "delegated" rather than universal jurisdiction. By joining the United Nations, nations delegate to the Security Council the authority to deal with certain issues in a broad range of ways;¹⁰² the Council could choose to exercise its authority through independent organs like the ICC. In this view, if the Security Council can authorize war against a member state,¹⁰³ surely it can authorize the lesser measure of prosecution of that state's nationals. This position has some merit: cases referred by the Security Council would be less obvious examples of universal jurisdiction than national prosecutions.

However, the U.N. Charter only lets the Security Council take measures against threats to "international peace," that is, against aggression *between* nations.¹⁰⁴ Thus the purview of the Security Council under Chapter VII does not extend to crimes committed by a nation against its citizens, or to a wide range of other universal offenses that can be purely domestic.¹⁰⁵ These may be violations of international law, but not necessarily of international peace. Most crimes within the ICC's statutory jurisdiction are of the latter variety—they do not require actual or threatened breaches of international peace.¹⁰⁶ Since such conduct is not obviously of the kind given by the U.N. Charter to the Security Council to deal with, the sounder view is that the Security Council has not been delegated jurisdiction over such crimes by member states, and thus cannot delegate jurisdiction to the ICC.

4. *NUJ in Federal Courts*

Over the past two decades some U.S. courts have begun to entertain cases based solely on NUJ—though unlike other nations, the United States has confined NUJ to civil litigation. The Second Circuit, America's NUJ pioneer, has found "federal court jurisdiction for suits alleging torts committed [by aliens] anywhere in the world against aliens" in violation of the law of

David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 17–18 (1999). The rejection of American proposals to change the language of certain provisions in a way that would clearly preclude the exercise of such jurisdiction, *id.* at 20, suggests the American position did not prevail.

102. *See* U.N. CHARTER art. 2 ¶ 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.").

103. *See* U.N. CHARTER art. 42.

104. U.N. CHARTER art. 39 (authorizing Security Council to declare and respond to "any threat to the peace, breach of the peace, or act of aggression").

105. *See* U.N. CHARTER art. 2 ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.").

106. *See* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, arts. 6, 7, 8(2)(c), July 17, 1998, U.N. Doc. 32/A/CONF. 183/9, 37 I.L.M. 999 (1998) [hereinafter ROME STATUTE].

nations.¹⁰⁷ *Filartiga v. Pena-Irala*¹⁰⁸ is the seminal case that opened federal courts to international human rights litigation.¹⁰⁹ It involved a suit brought under the Alien Tort Claims Act (“ATCA”), a statute passed in 1789 as part of the first Judiciary Act¹¹⁰ and rarely invoked until *Filartiga* revived it.¹¹¹

The piracy analogy has been important in the emergence of NÜJ as an appropriate basis for ATCA litigation. The *Filartiga* plaintiffs were Paraguayan citizens who alleged that the defendant, a Paraguayan official, had wrongfully caused their family member’s death by torture. The Second Circuit held that, based on universal jurisdiction, it had subject matter jurisdiction to hear the action. It declared in a now-famous passage: “for purposes of civil liability, the torturer has become—like the pirate . . . before him—*hostis humani generis*, an enemy of all mankind.”¹¹²

While the merits of its decision remain controversial, it has been followed by two other circuits that have assumed universal jurisdiction over high-profile cases involving foreign heads of state or senior officials as defendants.¹¹³ Subsequent cases under ATCA borrow *Filartiga*’s piracy analogy.¹¹⁴

107. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

108. 630 F.2d 876.

109. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (observing that *Filartiga* has a stature within public international law comparable to that of *Brown v. Board of Education* in constitutional law).

110. 28 U.S.C. § 1330 (1948) (corresponds to the Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79).

111. The Act had been used 21 times in the 190 years before *Filartiga*, though jurisdiction was only upheld in a few of them. Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 4–5 & nn.14–19 (2003) (citing pre-*Filartiga* ATCA cases). What made *Filartiga* radical was its broad endorsement of the universal principle as the sole basis of jurisdiction over suits between aliens. There had been only faint glimmerings of universal jurisdiction in some earlier cases. The early case of *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1,607) involved a dispute between a French captain who had brought a Spanish prize into Charleston and an Englishman who claimed property found on the prize vessel. Such prize disputes were staples of admiralty jurisdiction but the court, in a surprising and cryptic one-sentence dictum, suggested that ATCA could also afford an alternate basis for jurisdiction. A few years before *Filartiga*, the Second Circuit apparently upheld jurisdiction in a suit in which a Swiss citizen sued a West German citizen for the confiscation of plaintiff’s property during Nazi rule. *Dreyfus v. Von Finck*, 534 F.2d 24, 28 (2d. Cir. 1976). However, the Court held that there was no cause of action under the law of nations. *Id.* at 30–31. (That portion of the opinion was soon overruled by *Filartiga*, 630 F.2d at 884.) Thus the *Dreyfus* Court’s reading allowed for universal “jurisdiction” in a technical sense, but in practice barred relief in universal jurisdiction suits entirely between aliens. Blum & Steinhardt, *supra* note 10, at 55 (observing that pre-*Filartiga* cases “created the impression” that ATCA would not serve as means to redress wrongs done to foreigners by their own governments).

112. *Filartiga*, 630 F.2d at 890.

113. See, e.g., *Kadic*, 70 F.3d at 239–40 (relying on piracy analogy to exercise universal jurisdiction over a defendant who headed the breakaway Bosnian Serb republic, but treating him as a non-state actor); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 405–06 (S.D.N.Y. 2002) (exercising universal jurisdiction over the ruling party of Zimbabwe, but declining to exercise jurisdiction over President Robert Mugabe of Zimbabwe because of his sovereign immunity).

114. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 n.25, 185 (D. Mass. 1995) (holding, on the basis of the piracy analogy in *Filartiga*, that torture is a “universal” crime and thus federal courts have “universal jurisdiction” in an ATCA action brought by aliens and an American nun against former Guatemalan Minister of Defense alleging brutalities in Guatemala). Courts in other nations have relied on *Filartiga*’s piracy analogy as well. See, e.g., *Polynukhovich*, 172 C.L.R. at 565.

All of these cases take the piracy analogy and its heinousness premise at face value. No American court has actually examined whether piracy provides a valid precedent or reasoned basis for universal jurisdiction over human rights offenses under ATCA.

5. *The Piracy Analogy Ascendant*

Despite its notable advances in recent decades, NUJ itself remains controversial. Some argue that its expansion is normatively undesirable.¹¹⁵ Many make the case that nations have not yet accepted the expanded version of universal jurisdiction, and thus it is not an established aspect of international law.¹¹⁶ Yet scholars have failed to inquire into the piracy analogy's validity—that is, into whether the claimed similarities between piracy and the new universal offenses are real. To the contrary, most commentators have uncritically accepted the notion that piracy provides a good historical precedent for the modern exercises of universal jurisdiction.¹¹⁷ Indeed, current academic proposals to expand universal jurisdiction use analogies to piracy.¹¹⁸

To the extent that anyone has disputed the piracy analogy, it has been to note that piracy was a private activity, and thus at least somewhat dissimilar to modern universal offenses like war crimes.¹¹⁹ But this objection misses the

115. See, e.g., Morris, *supra* note 5, at 352–61 (offering several normative arguments against universal jurisdiction, particularly the possibility of politically motivated prosecutions and the potential to vex interstate relations).

116. For a sampling of recent scholarly criticism, see Lee Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L LJ. 840, 856 (2002) ("It is, in fact, difficult to find a single instance in which a State exercised 'universal' jurisdiction over offenses taking place within the territory of another State, where none of its nationals were involved."). As Alfred Rubin has noted:

In sum, it appears that current legal theories resting on an asserted universal jurisdiction in organs of the international community are the product of good-hearted thinking but cannot work as expected in the world of affairs. The appeal to Latin phrases [like the ones in the title] conceals a lack of thought as to what those phrases actually meant in Roman law and in how they can be applied in the current international order.

Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265, 280 (2001).

117. See, e.g., Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 30 n.37 (2001) (suggesting that opinions discussing jurisdiction over pirates within international law can yield general principles of universal jurisdiction applicable to other offenses); Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 39 (2001) ("It seems clear that the notion of universal jurisdiction originated from a need to bring pirates . . . to justice.").

118. For instance, proposed universal jurisdiction over bioterrorism has been analogized to piracy: [H]ostile infliction of biological agents is outside the limits of civilized behavior, and therefore must be a *jus cogens* crime against humanity Criminalization [of such conduct] should also serve to establish universal jurisdiction. The analogy here is piracy, and, as in piracy law, any state that can apprehend bioterrorists or investigate their activities should be legally obligated to do so and should have legal authority to prosecute them.

Barry Kellman, *An International Criminal Law Approach to Bioterrorism*, 25 HARV. J.L. & PUB. POL'Y 721, 730–31 (2001); as has terrorism, *see, e.g.*, Louis Rene Beres, *An Enemy of Mankind*, THE JERUSALEM POST, Nov. 3, 1995, at 5 (arguing that since terrorists are as deplorable as pirates, nations can kill them wherever they are found, just as pirates could be hung wherever they were caught and thus, Israel's practice of assassinating terrorists does not violate international law).

119. *See* BROWNLIE, *supra* note 20, at 236 ("The essential feature of the definition [of piracy] is that

point. The piracy analogy does not claim that pirates were subject to universal jurisdiction because they were private actors, or that today's universal jurisdiction should depend on the status or identity of the perpetrator. If universal jurisdiction over pirates was a product of their lack of state sanction, the analogy would fail to connect piracy to the Nazi war crimes, which were the first non-piratical offenses to fall within the expanded universal jurisdiction. Rather, as the next Section shows, the piracy analogy isolates the moral heinousness of the crime as the common denominator of all universal offenses.

C. The Heinousness Principle

The usefulness of the piracy analogy depends on isolating what it was about piracy that made it universally cognizable and then showing that the new universal offenses possess the same trait. Without identifying a rationale for universal jurisdiction over piracy that would also encompass modern human rights offenses, the jurisdictional status of piracy could militate *against* an expanded universal jurisdiction. Since piracy had for centuries been the only universal offense, unless it was an example of a generalizable principle, its unique status would suggest that it is the only crime suitable for universal jurisdiction.¹²⁰

The failure of efforts to extend universal jurisdiction without a unifying rationale highlights the importance of having a unifying concept. In the period before the two world wars, some commentators and international conferences proposed that jurisdiction over a variety of diverse offenses "should be assimilated to that over piracy."¹²¹ The offenses included cutting underwater cables, counterfeiting foreign currency, traffic in obscene publications, and the use of false radio signals.¹²² Some nations even enacted penal laws that "assert[ed] a jurisdiction to prosecute and punish such offences substantially as piracy is prosecuted and punished."¹²³

These efforts to expand universal jurisdiction failed because they did not identify any common strand that tied piracy to the offenses suggested for universal jurisdiction. Without identifying a unifying rationale, it is impossible for the law of nations to reach the necessary consensus about what offenses should be added to universal jurisdiction. Surveying the pre-war efforts to enlarge universal jurisdiction in 1935, the *American Journal of International Law* observed that it had not expanded beyond piracy because there was no agreement on the "basis" for treating crimes analogously to piracy.¹²⁴

the acts must be committed for private ends.").

120. See Eliot Abrams, *Justice for Pinochet?*, COMMENTARY, Mar. 1999, at 44 (arguing that piracy is the "exception . . . that proves the rule" that universal jurisdiction does not exist except over stateless actors).

121. See *Universality—Piracy*, *supra* note 55, at 569.

122. *Id.* at 569–71.

123. *Id.* at 569.

124. *Id.*

The modern argument for universal jurisdiction sees the historic treatment of piracy as evidence of an exception to standard jurisdictional limitations based on the “outrageousness” or “heinousness” of the crime.¹²⁵ In the NUJ theory, heinousness is the common denominator of piracy and the new universal offenses: these are crimes that are profoundly despised throughout the world.¹²⁶ This point was made in one of the first modern commentaries that called for war crimes to be subject to the same jurisdictional rules as piracy.¹²⁷ Heinousness has been a premise of the piracy analogy ever since.

Under the heinousness argument, it was the *substantive nature* of pirates’ acts¹²⁸—not the pirates’ status as private actors or the location of their crimes—that made them susceptible to universal jurisdiction.¹²⁹ This rationale allows universal jurisdiction to expand along with the expanding interna-

125. *Demjanjuk*, 776 F.2d at 583 (holding that because genocide is a heinous crime, “Israel or any other nation” may punish perpetrators of the Holocaust; *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 20 (D.D.C. 2000) (adopting the position of *Kadic* and Judge Edwards’ *Tel-Oren* concurrence that universal jurisdiction under ATCA will attach to “forms of egregious misconduct”); *United States v. Yunis*, 681 F. Supp. 896, 900 (D.D.C. 1988) (holding that aircraft hijacking was “so heinous and so widely condemned” that it was universally cognizable), *aff’d on other grounds*, 924 F.2d 1086 (D.C. Cir. 1991); *Furundzija*, Case No. IT-95-17, at ¶ 147, (citing *Filartiga* for the proposition that piracy sets a “revulsion” standard for universal jurisdiction, under which torture has also become a universal offense).

126. See, e.g., PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 2, at 48 (noting that selection of offenses as subject to universal jurisdiction depends on their having “such a heinous nature as to warrant” such jurisdiction); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2556–57 & n.78 (1991) (“One rationale for universal jurisdiction that is equally applicable to pirates and human rights violators is that both offenders commit acts so antithetical to common standards of civilization that they have, in effect, renounced the right to be protected by its laws.”).

127. See Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 217–18 (1945) (arguing that universal jurisdiction should be extended to war crimes because, like piracy, they are morally heinous).

128. See Blum & Steinhardt, *supra* note 10, at 60 (observing that piracy was universally cognizable because of its “heinousness” and that this principle has been extended to other “universally reprehensible” deeds); Randall, *supra* note 10, at 795 (“A more accurate rationale for not limiting jurisdiction over pirates to their state of nationality relies on the fundamental nature of piratical offenses. Piracy may comprise particularly heinous and wicked acts of violence or depredation . . .”). See also, Bassiouni, *supra* note 10, at 157 (defining universal jurisdiction as “criminal jurisdiction based solely on the nature of the crime”).

129. The heinousness rationale parallels the international law theory of *jus cogens*, the idea that some international norms override any contrary positive law or agreement between states. See Bassiouni, *supra* note 10, at 104 (arguing that the same moral criteria that support *jus cogens* support universal jurisdiction, and thus the two categories are congruent); Randall, *supra* note 10, at 829–30. *Jus cogens* has a strong natural law flavor, as it insists that moral rules derived from abstract principles trump positive law. Similarly, jurisdiction over an offense “becomes” universal, trumping positive notions of sovereignty-based jurisdiction, because of the abstract evil of the offense. Furthermore, the norms that publicists have identified as *jus cogens* closely track universal offenses. *Id.* at 830. The ICTY explicitly linked the concepts of *jus cogens* and universal jurisdiction.

One of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish . . . individuals accused of torture Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treatymaking power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.

Furundzija, Case No. IT-95-17, at ¶ 156.

tional consensus about what acts constitute the most heinous crimes.¹³⁰ Any crime that comes to be internationally recognized¹³¹ as extraordinarily heinous will become universally cognizable; those who commit them will not be able to claim the protection of a particular nation's jurisdiction.

Filartiga illustrates the centrality of heinousness in analogizing piracy to modern offenses. The only connection *Filartiga* drew between the pirate and the torturer was that both committed crimes widely regarded as violations of "fundamental human rights."¹³² While the court explained that torture was an extraordinarily heinous offense, and universally regarded as such, it took no such pains regarding piracy.¹³³ Nor did Judge Kaufman's opinion try to prove that piracy was universally cognizable *because* it was regarded as heinous.

The precise degree of evil necessary to create universal jurisdiction remains unclear. The test can only be qualitative and vague; courts often describe the standard in terms such as "shocks the conscience,"¹³⁴ "viewed with universal abhorrence,"¹³⁵ or, more tersely, "heinousness."¹³⁶ Certainly a particularly high degree of heinousness is required for a crime to fall within NUJ. Most crimes are arguably heinous in some sense, and if heinousness were

130. *Tel-Oren*, 726 F.2d at 781 ("Persons may be susceptible to civil liability [under ATCA] if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law."); Morris, *supra* note 5, at 337 ("The rationale for universal jurisdiction is that crimes such as genocide, war crimes, and crimes against humanity are an affront to humanity."); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 15 n.72 (2002) ("The application of universal jurisdiction has expanded based on the reprehensibility of specific crimes sufficient to shock the global conscience."); van der Vyver, *supra* note 117, at 41 ("The criterion for application of the principle of universal jurisdiction must be sought in the heinous nature of the crime . . . and not so much in the absence of territorial jurisdiction of national states with regard to the locality of the crime."). Professor van der Vyver understands that modern universal jurisdiction theory depends heavily on the law of piracy, but also recognizes that the treatment of piracy had more to do with the statelessness of the criminals and the scene of the crime than with its supposed heinousness. *Id.* at 39–41. It hardly follows from this that the rationale for today's universal jurisdiction must be sought in heinousness—one could just as easily argue that universal jurisdiction today would make the most sense in contexts genuinely analogous to piracy.

131. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987) ("Universal jurisdiction over the specified offenses is a result of universal condemnation of those offenses."). Thus, the set of offenses subject to universal jurisdiction can expand and contract as international mores change. See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. at 371 (noting the scope of universal jurisdiction is "not static"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987) (discussing the "expanding class of universal offenses"). In practice it has only expanded—no crimes that have ever entered the rolls of universal jurisdiction offenses have ever been struck from the list.

132. *Filartiga*, 630 F.2d at 890.

133. *Id.* at 882–85 (drawing on human rights treaties and U.N. declarations to show the general condemnation of torture as a particularly heinous crime).

134. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 63, 69–71 ("shock the conscience of humanity"); Strapatsas, *supra* note 3, at 13 (same).

135. *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992); *Filartiga*, 630 F.2d at 884.

136. *Tel-Oren*, 726 F.2d at 781 (D.C. Cir. 1984) (observing that universal offenses are those regarded with "universal concern"); *Filartiga*, 577 F. Supp. at 863 (observing that due to its "monstrous" nature, torture has joined piracy among offenses that make its perpetrators "outlaw[s] around the globe"); *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981) (dicta) ("Any nation may take universal jurisdiction when a heinous crime is involved. This principle has been used to justify jurisdiction for the proscription and prosecution of piracy.").

synonymous with illegality or even simple depravity, most common municipal offenses would be encompassed by NUJ. Yet proponents of NUJ see heinousness as describing a narrow class of offenses. While it may be impossible and unnecessary to reduce this standard to a formulation more precise than "heinous," it must be remembered that the heinousness in question is an extraordinary or aggravated heinousness. As one federal court exercising universal jurisdiction put it recently:

The acute form of misconduct entailed in international violations in many cases amounts to more than mere differences in degree [from their ordinary tort counterparts], and assumes differences in kind so fundamental as to compel distinct treatment under universally recognized rules. The "enemy of all humankind" . . . ranks as a different species from the ordinary tortfeasor of the typical case. Equally so is the class of universal rules that outcast the international outlaw, and thus declare him unworthy of all sovereign protections.¹³⁷

Courts look to municipal laws, international treaties, conventions, and U.N. resolutions as barometers of the international conscience. As none of these phrases articulates a clear rule, NUJ has grown through the accretion of one new offense at a time.¹³⁸ Even when courts conclude that universal jurisdiction does not apply to a particular offense, they often ratify the heinousness theory by using piracy as the benchmark of depravity required for universal jurisdiction.¹³⁹

D. How the Piracy Analogy Sustains NUJ

This Section discusses how the piracy analogy is used to support the new universal jurisdiction. Subsequent Parts of this Article will argue that the piracy analogy is itself fundamentally flawed; an understanding of the role it plays in justifying NUJ will be useful in assessing the extent to which the latter is compromised by the invalidity of the former. While the analogy is

137. *Tachiona*, 234 F. Supp. 2d at 416-17 (awarding damages under ATCA to Zimbabwean citizens for extrajudicial killing; torture; denial of political rights; cruel, inhuman, and degrading treatment; and racial discrimination that they suffered at the hands of Zimbabwe's ruling party).

138. Compare RESTatement (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (listing "piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes" as "offenses . . . of universal concern"), with J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 234 (10th ed. 1989) ("There are probably today only two clear-cut cases of universal jurisdiction, namely the crime of piracy *jure gentium*, and war crimes.").

139. See, e.g., *United States v. Schiffer*, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993) (finding that a deprivation of due process in violation of the U.N. Charter in the expatriation proceedings of a former concentration camp guard of the *Waffen-SS* cannot be compared in severity to piracy on the high seas, and thus cannot be the basis of universal jurisdiction); *Ctr. for the Independence of Judges and Lawyers of the U.S., Inc. v. Mabey*, 19 B.R. 635, 647-48 (D. Utah 1982) (finding that alleged bias and other official misconduct by bankruptcy judge does not rise "to the level of violations of universally accepted international law principles . . . in the same league with piracy on the high seas").

often invoked in rhetorical or trivial ways, this Section shows that it also provides a crucial intellectual mooring for NUJ.

1. Precedent and Tradition

Supporters of NUJ use the piracy analogy to put themselves on the side of tradition and to suggest that NUJ is nothing new, and thus nothing to worry about.¹⁴⁰ For example, one lawyer testifying before Congress in support of a proposal to give federal courts universal jurisdiction over war crimes reassured the legislators that such jurisdiction had been “historically well-settled” for hundreds of years based on the piracy analogy.¹⁴¹ Such talismanic use of history does not amount to reasoned argument; practices with deep historical roots can be foolish, and unprecedented innovations can have merit.¹⁴² If mere precedent-based arguments were the only use of the analogy, invalidating it would not seriously weaken the merits of NUJ, though it might sap its rhetorical appeal.

2. Moral Consistency

The piracy analogy also suggests that extending universal jurisdiction to human rights offenses is necessary to maintain a basic moral consistency. One attribute of justice is equity, or treating like crimes alike. If piracy were universally cognizable because of its heinousness, it would be perverse to give jurisdictional defenses unavailable to the pirate to those accused of war crimes and genocide. By establishing heinousness as the rationale of universal jurisdiction, the piracy analogy puts opponents of NUJ in the position of having to either question the heinousness of, for example, torture—which would be absurd—or to concede that it should be treated like piracy.

3. The Filartiga Problem

Precedent matters in a legal system where the decisions of previous tribunals partially limit the decisional freedom of subsequent tribunals. To find jurisdiction in *Filartiga*, the court had to overcome two subject matter jurisdiction hurdles. First, the *Filartiga* Court had to find that Congress intended to confer jurisdiction under ATCA, and then that Congress was entitled to

140. See, e.g., Benjamin B. Ferencz, *A Nuremberg Prosecutor's Response to Henry Kissinger*, 8 BROWN J. WORLD AFF. 177, 177 (2001) (“Kissinger argues, incorrectly, that the notion is of recent vintage. He gives scant weight to ancient doctrines designed to curb piracy.”); Roth, *supra* note 1, at 150 (“Kissinger begins by suggesting that universal jurisdiction is a new idea However, the exercise by U.S. courts of jurisdiction over certain heinous crimes committed overseas is an accepted part of American jurisprudence.”); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 41 (2002) (“The concept is of ancient pedigree, having been recognized for centuries.”).

141. See “The War Crimes Act of 1995,” Hearing on H.R. Before the Subcomm. on Immigration & Claims of the House Comm. on the Judiciary, 104th Cong. (June 12, 1996) (prepared statement of Mark S. Zaid).

142. See Richard A. Posner, *Past Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 579 (2000).

do so under Article III of the Constitution. The piracy analogy is important to both steps.

Filartiga needed some historical antecedent for its broad assertion of jurisdiction. Neither the Constitution nor ATCA expressly resolves the jurisdictional questions, and ATCA lacks legislative history that could provide illumination.¹⁴³ Influential Framers believed that it was officious and inappropriate for federal courts to interfere in disputes that did not directly concern the United States,¹⁴⁴ a view that helps explain why federal courts do not have alien diversity jurisdiction. This suggests that the founding generation would not have wished to give federal courts universal jurisdiction, at least not beyond the isolated case of piracy (and it is not even clear whether they granted universal jurisdiction for that offense). If the nineteenth-century notion of universal jurisdiction were specifically tailored to piracy and contained no broader generative principles that could make it applicable to other crimes, then it would seem unlikely that ATCA was designed to convey universal jurisdiction over any other crimes. However, if universal jurisdiction were understood by the founding generation as extending to heinous offenses generally, then it would be much easier to argue that federal courts have universal jurisdiction under ATCA over heinous human rights offenses, and that such a jurisdictional grant fits within Article III's limits on judicial competence.

4. *Endowment Effects*

The piracy analogy can help convince nations to permit the exercise of universal jurisdiction over their citizens by making acquiescence to such jurisdiction appear compatible with national dignity and sovereignty. The U.S. House of Representatives recently passed a bill that would authorize armed resistance to any attempt by the ICC to assert universal jurisdiction over American soldiers or officials.¹⁴⁵ But if the notion of sovereignty has

143. See *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) ("The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly Historical research has not as yet disclosed what section 1330 was intended to accomplish."); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."). One view of ATCA's purposes—based on inferences from the structure of the Judiciary Act and the concern expressed by some Framers that states might create foreign relations problems of the Judiciary Act for which the whole nation would be held accountable—is that it sought to ensure aliens a federal forum in cases involving international law, since a state court might handle such matters in a manner insensitive to the foreign relations concerns. See *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring) ("Concern that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien's country of origin, might have led the drafters to conclude that aliens should have the option of bringing suit in federal court, whatever the amount in controversy.").

144. See, e.g., THOMAS JEFFERSON, *Opinion on the French Treaties* (Apr. 28, 1793), in WRITINGS 422, 424 (1984) ("[N]ations are to be judges for themselves, since no one nation has a right to sit in judgment over another."); Alexander Hamilton, *Pacificus No. II* (July 3, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 55, 60 (Harold C. Syrett ed., 1969).

145. The Foreign Relations Authorization Act included a provision to protect U.S. personnel. However, when the Senate passed its version of the appropriation bill, that section was removed and remained absent from the enacted bill. The Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

long coexisted with universal jurisdiction over heinous crimes, the United States should not regard its sovereignty as challenged or infringed on by a foreign tribunal's exercise of universal jurisdiction over Americans. Behavioral psychologists have observed an "endowment effect" whereby people value a thing more if they already have it than if they do not.¹⁴⁶ This suggests that the United States would be more likely to accept NUJ if it regarded it as merely the manifestation of a pre-existing limitation rather than as a new erosion of sovereignty.

II. INVALIDITY OF THE PIRACY ANALOGY: PRIVATEERING

When the legal treatment of piracy is viewed in its historical context, it is clear that universal jurisdiction was not motivated by an international revolution at preying on civilian shipping. To the contrary, the law of every nation and the law of nations countenanced such behavior when carried out by state-licensed sea-robbers called privateers. This suggests that seizing ships and cargos at sea through threat of force was not considered to be extraordinarily heinous conduct.

Privateering was "a form of nationally sponsored piracy which reached its peak in the late 18th and early 19th centuries."¹⁴⁷ Privateers engaged in the exact same conduct as pirates: seizing merchant shipping through threat of lethal force.¹⁴⁸ Yet the latter were not subject to universal jurisdiction. They were not even regarded as criminals,¹⁴⁹ and a captured privateer would eventually be repatriated to his home state. The coexistence of piracy and privateering within one system of legal norms suggests that attacks on civilian shipping were not entirely beyond the pale within that set of norms.

The new universal offenses have, on the other hand, been chosen particularly for the inherent heinousness of the conduct constituting the offense. The heinousness premise of the piracy analogy holds that certain actions by their very nature make the perpetrators amenable to any nation's jurisdiction. Torture and genocide evoke a visceral repugnance. The repugnance would not be diminished if the torture or genocide had the blessing of nations, generals, or religious authorities. Yet clearly this is not how piracy was regarded by the nations of the world, for a document signed by a third-tier official of a second-rate province could transform a universally punishable

146. See, e.g., RICHARD THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 63–78 (1992); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1327 (1990).

147. ANGUS KONSTAM, PRIVATEERS AND PIRATES, 1730–1830, 3 (2001).

148. This point has been recognized by some modern scholars, but its relation to the piracy analogy and universal jurisdiction has not been explored. See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1615–16 (2002) ("Reprisal [under a writ of marque and reprisal], being the seizure of goods by force, could look a bit like piracy and robbery, especially if conducted by a private party. The critical difference, obviously, was the sovereign authorization.").

149. See DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES xvii–xviii (1995).

pirate into an innocent privateer.¹⁵⁰ This disparate treatment is incompatible with the kind of deep revulsion that, according to the piracy analogy, has always motivated universal jurisdiction. The recognition that piracy and privateering involved the same type of conduct and yet had radically different legal consequences indicates that pirates were not universally condemned because of the *nature* of their actions, but rather for their failure to comply with the formalities of licensing.

A. Prize Law

From the seventeenth century through the nineteenth century, nations would issue licenses called letters of marque and reprisal to private vessels.¹⁵¹ The letters permitted the bearer, known as a privateer, to stop and seize ships and cargo on the high seas.¹⁵² International law recognized the legitimacy of this licensed plunder.¹⁵³ All nations acknowledged the right of other sovereigns to authorize privateering. Privateering was such a staple of maritime activity that it is enshrined in the U.S. Constitution, which explicitly gives Congress the right to authorize commerce raiding.¹⁵⁴

Any ship could secure a letter of marque by satisfying certain minimum conditions, such as posting bond.¹⁵⁵ No inquiry into credentials—moral or

150. *See, e.g.*, United States v. Bass, 24 F. Cas. 1028, 1029 (C.C.D.N.Y. 1819) (No. 14,537) (finding that a privateer's blank commission issued by the fledgling government of Buenos Aires was enough to protect a defendant from a charge of piracy).

151. Marque and reprisal evolved from the medieval practice of reprisal, which allowed people to cross borders to obtain redress for a specific injury they suffered at foreign hands. By the mid-sixteenth century, marque and reprisal came to be used as a general license to prey on foreign shipping. During the war with Holland in the 1660s, King Charles II issued a letter permitting

general reprizall against the shippes goods and subjects of the States of the United Provinces, soe that as well his Majestie's fleet and shippes, as also all other shippes and vessels that shal be commissionated by letters of marque or generall reprizalls . . . may lawfully seize and take all shippes, vessels, and goods belonging to the States of the United Provinces, or anie their subjects or inhabitants within anie the territories of the States of the United Provinces.

Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT'L. L. 694, 721 (1933).

152. *See* C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954 (1997) ("Letters of marque and reprisal were government authorizations to private shipowners to seize property of foreign parties, usually ships or property from ships.").

153. HUGO GROTIIUS, THE RIGHTS OF WAR AND PEACE 312 (A. C. Campbell trans. 1901) (1624) (stating that all the law of nations endorsed the marque and reprisal practice); 2 WILLIAM BLACKSTONE, COMMENTARIES *250 ("These letters are grantable by the law of nations.").

154. U.S. CONST. art I, § 8 cl.11 (giving Congress the power to "grant Letters of Marque and Reprisal"). The existence of the Marque and Reprisal Clause does not reflect any doubts about the propriety of privateering. It is not an attempt to reduce it through regulation or an implication that the federal government might not inherently have the power to issue the writs. Instead, the purpose of the clause is to make clear that Congress, rather than the commander-in-chief, has the ultimate authority over commissions. This prevents the executive from evading the legislature's power of the purse. (Because privateers operated from their own funds, they did not require appropriations.) *See* Marshall, *supra* note 152, at 979–80. The clause also should be read in conjunction with Art. I, § 10 (prohibiting states from granting privateering licenses), making it clear that part of its purpose was to let Congress act exclusively of the states, which during the Revolution had vexed many of the Framers by competing with the Continental Congress in the licensing of privateers.

155. Even this requirement would be waived when a nation had great need for privateers. For exam-

maritime—was conducted. The officials responsible for issuing the writs handed them out in abundance.¹⁵⁶ Not only was there a lack of front-end controls on privateers, there was no supervision of them during their excursions. The only check on privateers by their national government occurred after they seized a vessel, when they would have to prove to a prize court that the seizure was lawful in order to gain valid title.¹⁵⁷

Two types of vessels sought privateers' commissions.¹⁵⁸ The ships that took the most prizes sailed specifically as commerce-raiders. These were fast, maneuverable, and bristled with cannon; their sole income came from seizing the ships and goods of others.¹⁵⁹ Merchant ships would also carry letters of marque and a few cannons in case they encountered an even slower or weaker vessel, which they might pounce on as a target of opportunity.¹⁶⁰ A letter of marque was the Age of Sail's version of horizontal diversification, allowing businessmen to exploit the "synergies" between commerce and commerce-raiding.¹⁶¹ Like most forms of prudent diversification, obtaining a writ of marque threw off risk, because profits from privateering were countercyclical to profits from trade; in time of international tension or war, trade diminishes and privateering increases.¹⁶²

Letters of marque also set forth rules of conduct for privateers, called "instructions," which were the price of the privateers' legal protection. The specific terms varied greatly, but the commissions always confined the holder to preying on ships of a specific nation or nations—in particular, enemies of the issuing state. Naturally, no nation granted letters of marque against its own shipping. Most privateering commissions put the shipping of neutral nations off-limits¹⁶³ so as not to provoke reprisal, but this limitation was prudential and not essential to the privateering system. The goods of neutral nations on board enemy ships were fair game for privateers. While letters of marque were routinely issued against the shipping of states at war with the

ple, during the latter years of the American Revolution, a promise of good behavior would be enough to get a license. *See* KONSTAM, *supra* note 147, at 16.

156. *Id.* at 3 (observing that writs of marque "were issued to almost anyone who applied for them"); Marshall, *supra* note 152, at 974 ("Commissions were granted as a matter of course" during the American Revolution.); CORDINGLY, *supra* note 149, at xviii.

157. *See id.* at 975 (showing that the only meaningful governmental control over privateers occurred in the prize proceeding).

158. *See id.* at 958 n.28 (describing the two types of ships engaged in privateering and noting "the line often blurred," with many having characteristics of both types); PETRIE, *supra* note 37, at 4–5.

159. *See* PETRIE, *supra* note 37, at 4–5.

160. *Id.* at 4.

161. *See* Marshall, *supra* note 152, at 965 (observing that privateering and trade were seen by the shipowners as complementary activities, so much so that government documents of the eighteenth century referred to privateering cruises as "mercantile voyages").

162. *See id.* (observing that as the American Revolution progressed, "privateering and legitimate trade existed in inverse proportion").

163. The 1781 Instructions to Privateers issued by the Continental Congress contained such a restriction. *See* 19 JOURNALS OF CONTINENTAL CONG. 361 (1781), *in* Kurland & Lerner, *supra* note 38, at 93 ("You are to pay a sacred regard to the rights of neutral powers . . . [and] permit all neutral vessels freely to navigate on the high seas.").

commissioning nation, they were by no means confined to wartime.¹⁶⁴ The Articles of Confederation explicitly authorized “granting letters of marque and reprisal in times of peace.”¹⁶⁵ Indeed, a major purpose (and the original one) for privateering was to allow for degrees of retaliation without escalation to war¹⁶⁶—thus, letters of marque and *reprisal*.¹⁶⁷

The nationality limitations help explain why states condoned what amounted to legalized piracy. Privateering allowed states to direct commerce-raiding toward the merchant fleets of their adversaries and rivals, and away from their own fleets. Of course, this reasoning does not explain why France, for example, would honor a writ of marque against French shipping. This can be explained by reciprocity—if France did not respect a British letter of marque, Britain would not respect those issued by France, with bloody consequences for the privateers of both nations.¹⁶⁸ All states benefited from this arrangement as letters of marque freed them from the expense of maintaining large standing navies. Thus the mutual tolerance of privateering can be seen, in part, as an unwritten arms limitation agreement.

In addition to the nationality requirement, other conditions in the privateers’ instructions related to the decent treatment of captured ships and crew. The most elaborate set of conditions established procedures for selling ships captured by the privateers, a body of rules known as prize law. The ship would be taken before a prize court that determined whether the ship was a lawful prize or not—that is, whether it was taken in accordance with the privateer’s letter of marque.¹⁶⁹ If so, the court would sell the captured ship and distribute the proceeds. Whoever purchased the prize or its cargo would enjoy superior title even against the original owner, despite the fact

164. *See Hooper v. United States*, 22 Ct. Cl. 408, 428 (1887) (“Letters of marque and reprisal may theoretically issue in time of peace.”). *See also* HARRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 292 n.151 (George Grafton Wilson ed., Clarendon Press 1936) (1866) (observing that letters of marque and reprisal could lawfully issue in peacetime).

165. Articles of Confederation, art. IX, cl. 1 (U.S. 1781).

166. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1176 (Melville M. Bigelow ed., William S. Hein and Co., 1994) (1891) (observing that writs of marque are often “a measure of peace, to prevent the necessity of a resort to war”).

167. *See id.*; 2 WILLIAM BLACKSTONE, COMMENTARIES *250:

[L]etters are grantable . . . whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words in themselves synonymous and signifying a taking in return) may be obtained, in order to seize the bodies or goods of the subjects of the offending state.

See also *Hooper*, 22 Ct. Cl. at 429 (“Speaking very technically, a letter of marque is merely a permission to pass the frontier, while a letter of reprisal authorizes a “taking in return,” a taking by way of retaliation, a *captio rei unius in alterius satisfactionem*.”).

168. Federal courts were loathe to recognize the commissions of Confederate privateers during the Civil War, as it would mean recognizing, at least in some sense, the Confederate government. Thus, while several Southerners were convicted of piracy—a crime with only one punishment in federal law—President Lincoln ensured that none were executed. Instead, they were treated as prisoners of war. He understood that Union privateers in Confederate hands would be treated no better than Confederate privateers in Union hands. For a concise review of this episode and the relevant scholarly commentaries, see *United States v. Steinmetz*, 973 F.2d 212, 219 (3d Cir. 1992).

169. *See* RUBIN, *supra* note 45, at 32.

that it had been taken from him by force. Seizure of property on the high seas was generally seen as a routine aspect of maritime commerce, and “the laws controlling prize taking were as familiar to the American populace as the rules of baseball are today.”¹⁷⁰

After the prize proceeding, the government would take its share of the prize’s value (usually ten percent) and the rest would be divided between the privateer’s owners, officers, and crew in accordance with a formula set out in the ship’s articles. (Another typical provision of the instructions was an injunction against “breaking bulk”—taking some cargo before the prize proceeding.) The sovereign’s ten percent share helps explain many aspects of privateering, from the governmental insistence on regularized prize proceedings (to ensure the authorities were not being short-changed by the privateer) to the liberal licensing of privateers by admiralty authorities.

B. The Equivalence Between Piracy and Privateering

Privateering did not differ from piracy in the substantive nature of the conduct, but only in the attendant formalities. The acts that privateers committed, plundering merchant ships on the high seas,¹⁷¹ would constitute piracy in the absence of a letter of marque. Indeed, the purpose of a letter of marque, from the bearer’s perspective, was to immunize him from charges of piracy.¹⁷² Like pirates, privateers stole civilian goods through threats of violence.¹⁷³ Merchantmen had little or no armaments and small crews¹⁷⁴ that had no incentive to resist,¹⁷⁵ while privateers and pirates, who divided the spoils, had incentive to fight. If a merchant vessel would not surrender, privateers, like pirates, would resort to arms.¹⁷⁶ Privateers could lawfully fire on

170. PETRIE, *supra* note 37, at 2.

171. Woodeson, Lect. 34, vol. 2., 422 (“Piracy, according to the law of nations, is incurred by depredations on or near the sea, *without authority from a prince or State.*”) (emphasis added), *cited with approval in Smith*, 18 U.S. at 163 n.8; *Dole*, 7 F. Cas. at 846 (“Piracy [i]s robbery on the sea . . . as committed by persons not holding any commission from or at the time pertaining to any established state.”) (emphasis added).

172. See, e.g., *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 165 (1795) (observing that privateer obtained a commission of dubious integrity because he believed it would “excuse him from the guilt of piracy”). See also 1 WILLIAM BLACKSTONE, COMMENTARIES *251 (writing that letters of writ and marque allow privateer to “attack and seize” property “without the hazard of being condemned as a robber or pirate”); *Ramsey, supra* note 148, at 1615 (“With sovereign authorization, a person engaged in reprisals would not . . . be treated like a pirate.”).

173. Manuel Schonhorn, *Postscript to DANIEL DEFOE, A GENERAL HISTORY OF THE PYRATES* 706 (Manuel Schonhorn ed., 1999) (1724) (“It was the overwhelming numbers [of men] on a pirate ship that prevailed, and usually without violence.”); Marshall, *supra* note 152, at 968–69 (writing that privateers avoided violence when possible, because their principal goal was plunder, not fighting, and they wanted to take their prize in one piece whenever possible).

174. Schonhorn, *supra* note 173, at 705 (noting that a typical pirate ship had at least four times as many sailors on it as did a merchant ship).

175. KONSTAM, *supra* note 147, at 25 (“In most cases the victim realised that resistance would only lead to an unnecessary loss of life, and they surrendered.”).

176. *Id.* at 25–27 (describing boarding and gunnery tactics used by privateers when victim vessels refused to surrender).

a civilian ship that resisted seizure.¹⁷⁷ When Congress passed a law to encourage privateering in 1813, it offered additional monetary rewards to those private citizens who would "burn, sink or destroy" British merchantmen.¹⁷⁸

Pirates have a fearsome reputation for torturing and murdering captives. But torture and murder were not necessary elements of the international crime of piracy. Moreover, there was no universal jurisdiction over torture and murder themselves, whether committed on the high seas or not. On the other hand, even pirates who never mistreated their victims were fully subject to universal jurisdiction.

Moreover, privateers often committed the same atrocities as pirates, and courts of the time knew this.¹⁷⁹ During the Revolutionary War, the British privateers committed such outrages as to "sen[d] a paroxysm of fear through Virginia."¹⁸⁰ Several civilians were murdered. The privateers were also accused of mutilations and "outrages against women," though these charges appear to have been exaggerated.¹⁸¹ Their behavior led the British admiral to complain that the privateers had "no idea of order or discipline."¹⁸² American privateers were also accused of misbehavior during the war, though this apparently went no further than unauthorized pillage and destruction.¹⁸³

Problems with privateers were not confined to the Revolutionary War. American authorities frequently complained of the unrestrained "piracies" committed by French privateers around the turn of the eighteenth century.¹⁸⁴ It was said of these robbers that they were "technically French privateers, but actually so irresponsible to governing power as to be in form only superior to freebooters."¹⁸⁵ The American ambassador to France complained that "were not the privateers acting under the protection of commissions from

177. See Marshall, *supra* note 152, at 962 (quoting letters of marque and reprisal issued by Congress authorizing commissioned ships "by force of arms [to] attack, subdue, and take" any British ship).

178. These words read just as menacingly then as they do now. When the crew of the American privateer *Greyhound* was captured and brought ashore by Newfoundlanders during the Revolutionary War, the rebels quickly showed their commission to save them from charges of piracy. It caused almost as much trouble as if they had no commission: "When she came to the clause authorizing the privateer to 'burn, sink or destroy' enemy shipping the crowd almost got out of hand and threatened to lynch the prisoners." NATHAN MILLER, *SEA OF GLORY* 264 (2000). Garret law did not prevail; the men were sent to Britain for the duration of the struggle. *Id.* at 265.

179. The Bermuda, 3 F. Cas. 270, 271 (E.D. Pa. 1866) (Cadwalader, J.) ("[S]o far as proprietary rights of neutrals were concerned, the commissioned belligerents [in the French Revolutionary Wars], French and English, who then swarmed the seas, were scarcely less dangerous than pirates. Like danger, though less in degree, may have been reasonably apprehended in some previous European wars."); *Hooper*, 22 Ct. Cl. at 433 (describing certain privateers being "as irresponsible" as pirates).

180. See JOHN SELBY, *THE REVOLUTION IN VIRGINIA 1775–1783*, 207 (1988).

181. See Burris M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest For Humanity in War*, 139 MIL. L. REV. 83, 114 (1993).

182. See SELBY, *supra* note 180, at 206.

183. See Marshall, *supra* note 152, at 971.

184. See *Hooper*, 22 Ct. Cl. at 431. See also DAVID McCULLOUGH, *JOHN ADAMS* 487 (2001) (describing torture of American prisoners by French privateers in the last years of the eighteenth century).

185. *Hooper*, 22 Ct. Cl. at 434 (describing the conduct of privateers in the Gulf of Mexico at the turn of the eighteenth century).

the French Government, they would be pronounced pirates.”¹⁸⁶ However, despite their purported cruelty, the United States continued to treat them as privateers. And none of this “piratical” conduct would expose the privateers to universal jurisdiction.

Indeed, excesses by privateers were recognized to be inevitable. Pirates and privateers drew their crews from the same rough and destitute labor pool.¹⁸⁷ Pirates were often laid-off privateers. Privateering thus encouraged piracy. As Daniel Defoe wrote in 1724, “Privateers in Time of War are a Nursery for Pirates against a Peace.”¹⁸⁸ Conversely, when nations needed extra muscle in wartime, they would pardon pirates who agreed to attack enemy shipping. Predictably, privateers accustomed to attacking ships for a living often neglected regulations when they encountered a lucrative prize outside the scope of their commission.¹⁸⁹ Even a privateer who exceeded his commission and attacked neutral shipping would not necessarily be treated as a pirate.¹⁹⁰

Motive can matter in assessing the moral culpability of an offense. Some courts and commentators have suggested that *animo furandi*, or a larcenous as opposed to political motive, is an essential element of the piracy offense.¹⁹¹ The *animo furandi* requirement, if valid, would suggest that piracy was considered particularly heinous because of the base or selfish motives involved. *Animo furandi* played a role in some piracy cases because a consideration of mens rea could help determine whether those who seized goods at sea while participating in “a struggle for public power,” such as a rebellion or war¹⁹² were in fact pirates or merely the privateers of a nascent state. However, contrary to the interpretation of some commentators, *animo furandi* does not account for the distinction between pirates and privateers in the general run of cases.

The Supreme Court has rejected the contention that motive rather than conduct defines piracy.¹⁹³ Both privateers and pirates acted principally for

186. Letter to Thomas Pinckney (Jan. 1797), *quoted in Hooper*, 22 Ct. Cl. at 439.

187. See Barbour, *supra* note 53; RICHARD ZACKS, PIRATE HUNTER: THE TRUE STORY OF CAPTAIN KIDD 12 (2002).

188. DEFOE, *supra* note 173, at 4. The sentiment was frequently repeated. As William Whipple wrote to Josiah Bartlett in 1778, “Those who are actually engaged in it [privateering] soon lose every Idea of right & wrong, & for want of an opportunity of gratifying their insatiable avarice with the property of the Enemies of their Country, will without the least compunction seize that of her Friends.” *quoted in* Marshall, *supra* note 152, at 968 n.74.

189. See Marshall, *supra* note 152, at 976. The classic example is Captain Kidd. See ZACKS, *supra* note 187, at 26, 72 (describing temptations for privateers to “turn” pirate).

190. See *Talbot*, 3 U.S. at 154 (1795) (“A capture [by one acting “under color” of a dubious commission], although not piratical, may be illegal, and of such a nature as to induce the court to award restitution.”); Marshall, *supra* note 152, at 976. However, if a privateer preying on neutral shipping were caught by that neutral nation, he might well be hung under that nation’s municipal law.

191. Morris, *supra* note 5, at 339 (“From its inception, the law of piracy distinguished “pirates,” who operated privately and for private gain, from “privateers” or others commissioned or authorized by states.”); Randall, *supra* note 10, at 797–98 & nn.70–75 (discussing criticisms of the private-ends requirement).

192. RUBIN, *supra* note 45, at 82.

193. The Malek Adhel, 43 U.S. 210, 232 (1844) (holding that piracy in the law of nations “means that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power”).

the sake of private gain, and indeed, the name of the former profession attests to their self-interested motives. The difference was that privateers sought their fortunes in a manner consistent with the interests of a particular state, and in return received that state's protection. Privateers could be thought of as government contractors, and as such their motives were not inherently any more political or less commercial than those of caterers of public school cafeterias.

Indeed, privateering was widely regarded as a way to "get rich quick" while avoiding the hangman's noose. Even the celebrated privateers of the American Revolution were inspired by the prospect of easy spoils.¹⁹⁴ Indeed, sailors signed on to privateering instead of naval vessels because the former offered them a much larger share in captured prizes. To be sure, national goals helped motivate many privateers, and many used such rhetoric to help attract sailors.¹⁹⁵ But the same was true of pirates. For example, many pirates who preyed primarily on British ships were Irishmen hostile to Britain, or English Catholics who in their gallows speeches proclaimed, not implausibly, a continued loyalty to James I as their motive.¹⁹⁶ Thus it was not the motive or intent that distinguished privateers from pirates—it was the formality of sovereign authorization.

C. Formalities, Bright-Line Rules, and Inherent Heinousness

Formalities sometimes matter. Legal authorization can make a significant difference in the morality and social acceptability of conduct. Redistributive taxation and eminent domain can be redefined as government-authorized theft and trespass and war as state-sanctioned murder. In these and other contexts, state authorization makes otherwise reprehensible conduct acceptable, even honorable. This suggests that the differences between privateering and piracy, while paper-thin, may be quite meaningful, and that broad tolerance of the former does not necessarily imply that the latter was not seen as very bad.

The point of comparing piracy to privateering is to show that the former was not characterized by the kind of extraordinary heinousness that serves as the common denominator for NUJ. Piracy was a *malum in se* crime and thus obviously considered reprehensible to some degree. But consider the offenses that, by analogy to piracy, have come within the ambit of NUJ: genocide, torture, rape, and apartheid. None of these offenses could be redeemed by state authorization or licensing; the acts are innately and always evil. Piracy was obviously regarded as belonging to a lesser, ordinary class of evils, more

194. JOHN F. LEHMAN, *ON SEAS OF GLORY: HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY* 42–43 (2001); Marshall, *supra* note 152, at 964–65 (arguing that Revolutionary War privateers were businessmen inspired principally by the prospect of large profits).

195. One sea captain with a brand-new privateer's commission tried to recruit rough sailors in Manhattan taverns by promising "a unique *legal* opportunity to steal from pirates and from the hated French." ZACKS, *supra* note 187, at 11.

196. KONSTAM, *supra* note 147, at 5.

like murder than war crimes. So piracy was regarded as heinous in a weak sense, along with many other offenses. It is hard to see how this could provide a basis for singling out piracy as the sole universal offense.

It is possible that the divergent treatment of pirates and privateers reflected an estimation that while both despoiled commercial shipping, the latter were as a class less prone to committing atrocities in the process. The willingness of privateers to submit to up-front licensing perhaps signaled that they were generally more law-abiding than those who disregarded the procedures. Similarly, the privateers' need to present their captures to a prize court also made it more likely that any violence they perpetrated would come to the attention of the authorities.¹⁹⁷ This would have deterred privateers from torture and murder while at sea—and the difficulty of preventing crime at sea was certainly one of the reasons for the harsh treatment of piracy. Establishing a regularized procedure for forcibly taking property at sea increased the convenience and safety of both victim and perpetrator; privateers were not tempted to kill prisoners because they were not afraid of leaving witnesses since they were doing nothing illegal.

Therefore it could be that privateering had less of the concomitant savagery often attributed to piracy. However, this does not point to heinousness as the root of universal jurisdiction over piracy. If licensing privateers was supposed to curb the abuses incident to piracy, it was akin to modern arguments that legalizing and licensing prostitution or the sale of narcotics would reduce the violence that often accompanies, but does not define those crimes. The *actus reus* of piracy—forcible taking on the seas—remains the same when done by a privateer, unmitigated by the regulatory apparatus. If the violence of piracy made it heinous and thus subject to universal jurisdiction, it is puzzling that outrageous acts of violence themselves, whether committed at sea or on land, were not subject to universal jurisdiction. Even if privateers were considered less heinous as a class than pirates because they were statistically less likely to commit atrocities, the heinousness hypothesis does not explain why, *ex post*, when privateers did commit atrocities, they were not subject to universal jurisdiction.

D. Historical Recognition of the Close Relationship Between Piracy and Privateering

Contemporary observers recognized the substantive equivalence between the actions of pirates and those of privateers.¹⁹⁸ This is not to say that privateering was generally regarded as being no better than piracy. The fact that the former was legal demonstrates that some distinction was made. The rele-

197. See Marshall, *supra* note 152, at 975 (“[T]he prize courts . . . were a real check on privateers, often the only one.”).

198. See *id.* at 971 n.92 (describing the opinion, “commonly expressed” in the eighteenth century, that “privateering was little better than piracy,” and noting that on the whole Revolutionary War privateers were better than most).

vant point for the piracy analogy and modern universal jurisdiction is that the distinction did not turn on the relative heinousness of privateering and piracy. Courts and commentators agreed that privateering consisted of the same conduct, the identical *actus reus* as piracy. The only difference was the privateer's sovereign commission.¹⁹⁹ The rapacity of privateers in the West Indies during the late 1600s led many colonial legislatures to enact measures for "restraining and punishing privateers and pirates."²⁰⁰ As one commentator put it, "the conjunction of the terms is significant," showing that licensed privateers, immune from hanging, had none the less become an equal menace.²⁰¹

Privateering was regarded by an influential minority of observers—including Benjamin Franklin and Thomas Jefferson—as being in every respect as bad as its illegal sibling.²⁰² They argued that privateering should be banned, and thus put on the same footing as piracy. Interestingly, the arguments in favor of privateering focused mostly on the importance of privateering to national defense; the usefulness of privateering as a tool of state policy helped many who saw privateering and piracy as being equally odious to accept the former for pragmatic reasons. Courts were surprisingly frank about the fact that the distinction did not turn on the relative violence of the pirates' and privateers' conduct.²⁰³ The jurists of the maritime nations agreed that piracy was nothing more than "privateering without a commission."²⁰⁴ Conversely, privateering was nothing more than piracy with a commission.

An awareness that privateering and piracy were birds of a feather emerged as early as the seventeenth century, illustrated in the poem *Of Honest Theft* by the courtier Sir John Harington.²⁰⁵ In the poem, the narrator had been accused by a friend of lifting all his ideas from classical sources. The critic, however, is a privateer, who gained considerable wealth by plundering Spanish

199. See ZACKS, *supra* note 187, at 10; Ramsey, *supra* note 148, at 1617 ("[S]overeign authorization was thought [in the eighteenth and nineteenth centuries] necessary to distinguish peacetime reprisals from piracy, particularly if committed by private parties.").

200. See R. G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 26 ENG. HIST. REV. 34, 56 (1911).

201. *Id.*

202. See *supra* text accompanying notes 179–182.

203. H.M. Advocate v. Cameron & Others, 1971 S.L.T. 202, 204 (H.C.J.) (observing that "privateering without a commission or letters of marque" constitutes piracy); United States v. Jones, 26 F. Cas. 653, 656 n.2 (D. Pa. 1813) (No. 15,494) ("The words of this learned writer are, 'but whether one be a pirate or not, depends upon the fact, whether he has or not, a commission to cruise.'").

204. *The Ambrose Light*, 25 F. at 417; Davison v. Seal-Skins, 7 F. Cas. 192, 196 (D. Conn. 1835) (No. 3,661) (recounting how U.S. Navy released "a nest of pirates" from custody upon learning that they had been acting under Argentinean commission); Naval Regulations of 1876, c. 20 s. 18 (cited in *The Ambrose Light*, 25 F. at 418) (requiring naval vessels to "consider as pirates" the company of any vessel acting as a "privateer without having a proper commission to so act"); King James II Irish Pirates Case *cited by The Ambrose Light*, 25 F. at 422 ("Piracy was nothing but seizing ships and goods by no commission."); KENT, *supra* note 38, at 87 ("Piracy is robbery . . . on the high seas, without lawful authority").

205. Sir John Harington, *Of honest Theft. To my good friend Master Samuel Daniel*, in EPIGRAMS (1618), in THE PENGUIN BOOK OF RENAISSANCE VERSE, 1509–1659, 709 (H.R. Woodhuysen ed., 1993).

shipping: “fellow Thiefe, let’s shake together hands,/ Sith both our wares are filcht from forren lands.” The poem concludes with this sharp couplet equating privateering with robbery: “You’le spoile the Spaniards, by your writ of Mart²⁰⁶:/ And I the Romanes rob, by wit, and art.” The reader is left to guess whose depredations are the “honest theft” of the title.

Awareness of the consanguinity between piracy and privateering was also reflected in the occasional popular movements to ban the latter. The fact that nations authorized plunder at sea greatly offended the sensibilities of some contemporary observers. If, as some people thought, the privateer was morally no better than the pirate, then the letter of marque amounted to governmental involvement in a rather dirty business. In colonial America, there was “general opposition to privateering ‘on moral and humanitarian grounds.’”²⁰⁷ Consider the Virginia Supreme Court’s eighteenth-century lament at what it saw as the government’s endorsement of robbery: “[P]iracy is now generally denominated hostility to mankind . . . But is privateering, which many of the present enlightened age seem to think justifiable, any thing but piracy licensed imperially, and can such a license consecrate it?”²⁰⁸ But the Court did not challenge the legality of privateering, only its morality. In the mid-nineteenth century, one of the largest circulation periodicals of the day, *Harper’s New Monthly Magazine*, launched a campaign against the licensing of privateers.²⁰⁹ The *Harper’s* series stressed that both pirates and privateers took that which was not theirs, and were thus *in pari delicto*.²¹⁰

In the earliest days of the nation, influential founders campaigned to abolish privateering. As the U.S. emissary to France, Benjamin Franklin was responsible for issuing hundreds of letters of marque and adjudicating the subsequent captures. The experience led him to take a dim view of privateers because they preyed on unoffending and unarmed civilian shipping, which seemed as distasteful to him when done with a license as without one.²¹¹ In June 1780, with the war still on, Franklin proposed that unarmed commercial vessels, even British ones, be put off limits to privateers.²¹² During the peace negotiations with Britain, Franklin proposed a stipulation entitled “Proposition Relative to Privateering,” a draft agreement aimed at “improving the law of nations, by prohibiting the plundering of unarmed and usefully employed people.”²¹³ In other words, in any future conflict between Britain and the United States, neither side would use privateers to attack and rob civilian ships. The British rebuffed the overture.²¹⁴

206. This is an archaic form for a “writ of marque and reprisal.” The other unusual spellings also come from the original text.

207. Marshall, *supra* note 152, at 967.

208. *Page v. Pendleton*, 1793 Va. LEXIS 53, *2 n.2 (note in 1795 edition of text).

209. Benson J. Lossing, *Scenes in the War of 1812*, HARPERS, Oct. 1864, at 596.

210. *Id.* at 607.

211. See Carnahan, *supra* note 181, at 118.

212. *Id.*

213. *Id.*

214. JEFFERSON, *Autobiography*, in WRITINGS, *supra* note 144, at 56. Jefferson thought the British

The sentiment against privateering against civilian shipping was not confined to Franklin. In 1783, a congressional committee proposed that all future treaties include stipulations very similar to Franklin's proposal. The committee consisted of Jefferson, Hugh Williamson, and Elbridge Gerry—a successful privateer and author of Massachusetts' privateering statute, who as a delegate to the Constitutional Convention four years later, suggested the adoption of the Writ of Marque Clause.²¹⁵ Of course other important Framers, like John Adams championed privateering against civilians—because he saw it as the only way to beat the British.²¹⁶

The different approaches to privateering taken by Franklin and Adams illustrate both why it was subject to persistent criticism and why it was ultimately tolerated in international law. The critics saw that attacking civilian shipping on the high seas was tantamount to piracy and encouraged piracy. However, defenders of privateering understood that the maritime powers depended on it as a tool of naval policy.²¹⁷ Not surprisingly, the latter consideration prevailed. Licensing robbers was regarded by politicians as an acceptable, though perhaps regrettable, price to pay for naval power. No nation could afford the expense of a large standing fleet, but there were vast merchant fleets that could easily be enticed into privateering.²¹⁸ Privateers helped secure military victories for the United States in both the War of Independence and the War of 1812.²¹⁹

No nation repudiated privateering until the Treaty of Paris in 1856. And many maritime powers, including the United States and Spain, never joined that treaty. Though the United States stopped issuing letters of marque after the War of 1812,²²⁰ it has never repudiated the power to do so.²²¹

refusal unwise: "[T]heir superior commerce places infinitely more at hazard on the ocean than ours; . . . and as hawks abound in proportion to game, so our privateers would swarm in proportion to the wealth exposed to their prize, while theirs would be few for want of subjects of capture." *Id.* Of course, with its superior fleet Britain may have thought its privateers could do more damage than the Americans', or it may not have wanted to establish a precedent that it would not want to extend to France and Spain.

215. See Carnahan, *supra* note 181, at 121.

216. See Marshall, *supra* note 152, at 964 n.54, 969.

217. KONSTAM, *supra* note 147, at 3. See Marshall, *supra* note 152, at 967–68 (observing that popular opposition to privateering diminished in periods when seizures by privateers provided scarce goods to domestic markets).

218. *Fitfield*, 47 Pa. at 169 (describing the piracy-privateering distinction and praising privateering as "the substitute for enormous naval establishments").

219. See KONSTAM, *supra* note 147, at 3 (describing privateering as "a vital part of [America's] maritime strategy" in these wars); LEHMAN, *supra* note 194, at 44–45 & 64; MILLER, *supra* note 178, at 281–82. During the Revolutionary War, the Continental Congress issued 1,697 letters of marque, and individual states issued hundreds more. These vessels seized roughly 2,208 British ships. *Id.* at 260.

220. See Marshall, *supra* note 152, at 954.

221. It is possible that the long disuse of letters of marque has lead to their condemnation as a matter of customary international law. See LEHMAN, *supra* note 194, at 68. The implications of such an international norm for the United States would be unclear because "it has been thought that the constitutional provision empowering Congress to issue letters of marque deprives it of the power to join in a permanent treaty abolishing privateering." BLACK'S LAW DICTIONARY 1196 (6th ed. 1990) ("privateer").

E. Privateering as a Defense to Charges of Piracy

The close relation between piracy and privateering becomes particularly apparent in the many piracy prosecutions that turned on the validity or existence of a letter of marque. Privateering was one of the most common defenses to a charge of piracy.²²² In these cases, no one disputed the facts of the defendants' depredations. Rather, all attention focused on the validity of a commission, which made the difference between freedom and death for the defendant.²²³ Because the distinction between the two was thin, hard cases often stretched it to the breaking point. The validity of commissions became particularly murky during rebellions and secessions, when the break-away government began issuing letters of marque.²²⁴ Were those sailing with such documents universally cognizable pirates or legal privateers? During the Revolutionary War, the British deemed colonial privateers mere pirates. The Civil War forced American courts to decide the same issue with respect to Confederate privateers. The Union regarded them as pirates (but never actually treated them as such), while other nations recognized the validity of Confederate letters of marque.²²⁵ Throughout the nineteenth century, American courts had to wrestle with the legitimacy of writs of marque issued by Latin American revolutionaries, tin-pot despots, governors, and mid-level military officers.²²⁶ In these cases the pirate-privateer distinction could turn on a matter as mundane as whether a particular official had assumed his post as of the date of the writ of marque.

F. Summary

The side-by-side coexistence within the same international legal order of legal privateering and universally punishable piracy undermines the theory that piracy was regarded as a wildly depraved practice entirely outside the bounds of civilized conduct. Were piracy regarded as a singularly heinous offense, sovereign authorization might mitigate the offense but not negate it. To be sure, piracy was regarded as morally wrong. But the heinousness-based

222. The other common defense was duress. Defendants frequently claimed that the other pirates forced them to join the gang on pain of marooning or death. *See generally* DEFOE, *supra* note 173.

223. *See, e.g.*, United States v. Bass, 24 F. Cas. 1028, 1029 (C.C.D.N.Y. 1819) (No. 14,537) (holding that while validity of defendant's commission was dubious, "in a case of life or death" it would be "sufficient to exculpate the prisoner from the charge" of piracy).

224. *See* *Fitfield*, 47 Pa. at 169 ("If the *Jeff Davis* was not a privateer she was a pirate, and if she was a privateer she was made so by the commission she bore. The legal effect of that commission, therefore, must depend upon the *status* of the Southern Confederacy.") (emphasis in original).

225. *See, e.g.*, *Fitfield*, 48 Pa. 166; *see also* *Steinmetz*, 973 F.2d at 218–19 (discussing how Union proclaimed Confederate privateers to be pirates, but treated them as prisoners of war in hopes of securing similar treatment for Union privateers).

226. *See* *The Ambrose Light*, 25 F. at 408 (involving seizure of privateer vessel commissioned by a member of a Carthagena junta, who also happened to own the vessel); *see also* *Novion v. Hallett*, 16 Johns. 327, 335 (N.Y. Sup. Ct. 1819) ("If the *Carthagena* schooner [which purported to sail as a writ of marque], in the present case, had no commission as a letter of marque, then, according to the charge of the judge, the taking of the plaintiff's brig was an act of piracy . . .").

view of universal jurisdiction that roots itself in piracy law does not posit that universal jurisdiction should apply to *all* conduct widely recognized as immoral and illegal, but only to those few crimes that most offend the conscience. Natural law concepts inform NUJ and much of modern human rights law. The heinousness required by NUJ is an evil *inherent* in certain actions. The common denominator of NUJ offenses is that they are so heinous that sovereign authorization would not make them any better. Yet sea robbery was historically not seen as an inherent wrong of this kind, as is clear from the issuance by every maritime nation of licenses to engage in sea robbery.

III. INVALIDITY OF THE PIRACY ANALOGY: HEINOUS ROBBERY?

Long before the international law of piracy emerged, all civilized nations criminalized certain conduct, like arson and murder, and agreed that certain crimes were worse than others. Yet the law of nations made only piracy a universally punishable crime. If heinousness explains universal jurisdiction, then piracy must have been regarded as a *singularly* heinous crime in comparison to the other, non-universal offenses. Proponents of the heinousness view have done little to document the proposition that piracy was historically regarded as among the most heinous offenses. The piracy analogy often simply assumes that because only piracy was treated as a universal offense, it must have been considered the most heinous one. This Part draws on contemporary sources to reconstruct where piracy fell in the ranking of offenses. This Part finds that piracy was considered not a substantively graver offense than many other crimes that were not subject to universal jurisdiction. While piracy was certainly a serious crime, it was not thought to be the worst, and thus heinousness fails to explain its universal cognizability.

A. No More Heinous Than Robbery

Piracy was simply a subspecies of robbery, and it was defined by reference to robbery on land.²²⁷ This suggests, as a first-order approximation, that piracy was considered to be as reprehensible as robbery. Property crimes were certainly regarded by all nations as serious offenses, especially when they resulted in a substantial or ruinous taking, as would often be the case with piracy. But property crimes have also long been considered less severe than crimes against the person, such as wounding, rape, and murder.

To be sure, piracy was a particularly troublesome variety of robbery. Its occurrence on the high seas was an aggravating circumstance because it made it harder to prevent—but this makes it comparable to night burglary and horse thievery, neither of which were universally cognizable. Enforce-

227. See *Smith*, 18 U.S. at 163 (“Piratae, latrones, praedones, are used to denote the same class of offenders; the first term being generally applied to robbers or plunderers on the sea, and the others to robbers or plunderers on land. The terms are, indeed, convertible in many instances . . .”).

ment difficulties are relevant to the severity with which a crime is treated, but unrelated to “heinousness” in the sense of moral enormity. Thus one cannot infer heinousness from the harsh punishment for piracy. Equally harsh penalties were applied to other forms of robbery that were difficult to police or deter—but that were not subject to universal jurisdiction.²²⁸ Thomas Jefferson, like many of his contemporaries, regarded piracy as on par with robbery, and did not put it in on the same level as murder and treason.²²⁹ When he drafted revisions to the criminal law of the Commonwealth of Virginia, he proposed abolishing the death penalty for all crimes except murder and treason,²³⁰ thereby removing piracy from the class of capital offenses. He treated piracy as a form of robbery, making it punishable by five years hard labor and treble damages—only slightly more severe than the four years and double damages for simple robbery.²³¹ This gives some sense of how piracy was thought to compare to other offenses in terms of heinousness. To be sure, Jefferson was a reformer: his Bill for Proportioning Crimes and Punishments was meant to break with established practice,²³² and so his views about the proper punishment for piracy cannot be taken as representative of the prevailing attitudes of the time.²³³ Indeed, it took Congress over 100 years to abolish the death penalty for piracy.²³⁴ But again, the severity of the punishment is generally dependent on factors such as ease of commission and detection. Jefferson, however, believed that punishments should be strictly proportionate to the magnitude of the offense,²³⁵ and thus his

228. See KENT, *supra* note 38, at 87 (“[T]he severity with which the law has animadverted upon this crime, arises from [among other things] . . . the difficulty of detection, and the facility with which robberies may be committed upon pacific traders, in the solitude of the ocean.”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 244, 249 (5th ed. 1998); ADAM SMITH, *LECTURES ON JURISPRUDENCE* ii.156 (R.L. Meek et al. eds., 1978) (“Piracy is another species of robbery which likewise requires a severe punishment . . . [because of] the great opportunities there are of committing it and the great loss which may be sustained by it . . .”). Deterrence can be increased either through greater law enforcement *ex ante*, or heavier punishments *ex post*. As enforcement becomes more difficult or expensive, societies substitute from more policing to heavier punishment. See *id.* at 244. The classic example is the gallows for horse-thievery in the American West, which like the high seas was not densely populated and thus hard to police. See *id.* at 249.

229. JEFFERSON, *A Bill for Proportioning Crimes and Punishments*, in *WRITINGS*, *supra* note 144, § 19.

230. *Id.* §§ 3–7; JEFFERSON, *Autobiography*, *supra* note 144, at 39 (“All [the revisers] were agreed that the punishment of death should be abolished, except for treason and murder . . .”).

231. JEFFERSON, *A Bill for Proportioning Crimes and Punishments*, in *WRITINGS*, *supra* note 144, § 19.

232. See *id.* § 1 (noting that Bill represents a break from “cruel and sanguinary laws”); JEFFERSON, *Autobiography*, *supra* note 144, at 40.

233. Indeed, Jefferson admitted in regard to his support for significantly contracting the death penalty, that “the general idea of our country had not yet advanced to that point,” and his Bill was defeated in the House of Delegates by one vote. See JEFFERSON, *Autobiography*, *supra* note 144, at 40–41.

234. See Act of Jan. 15, 1897, Ch. 29, 29 Stat. 487 (1897) (changing the death penalty under the Act of 1790 to “imprisonment at hard labor for life”). Even the present piracy statute imposes a stiffer penalty than Jefferson’s proposal did. See 18 U.S.C. § 1651 (2000) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”). Other Western nations have also eliminated the death penalty for piracy as part of their broader abolition of capital punishment in the decades after World War II.

235. See JEFFERSON, *A Bill for Proportioning Crimes and Punishments*, *supra* note 144, § 1 (arguing that a criminal should only “suffer[] a punishment in proportion to his offense” and so “it becomes a duty in

scheme offers a good insight into the ordinal ranking of piracy among other crimes whose heinousness can be readily intuited today.

Furthermore, many other offenses could and did occur regularly on the high seas, and yet none were subject to universal jurisdiction. For example, assault or murder on the high seas unaccompanied by robbery would not be treated as piracy and would not be subject to universal jurisdiction by the law of nations.²³⁶ Thus location was not regarded as making an offense more depraved or heinous. Courts did not attempt to rank piracy within a broader hierarchy of offenses; as the penalty for piracy was fixed by statute, such moral investigations would serve little purpose. Yet in a few cases, the Supreme Court had occasion to consider where piracy fell within the universe of serious offenses. In *United States v. Palmer*²³⁷ the Court implied that piracy was no more heinous than ordinary robbery. The case turned on the construction of the law passed by the First Congress in 1790 criminalizing piracy,²³⁸ the first legislation pursuant to the Piracies and Felonies Clause.²³⁹ The act called for a mandatory death penalty upon conviction of piracy, defined as "murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death."²⁴⁰

The question faced by the court was whether the phrase "which if committed" modified both the particular and general antecedents—murder, robbery and "other offence[s]"—or only the last, undefined category. The latter reading would mean the statute condemned high-seas murder, robbery, and any offense that would be capital on land, whereas under the former reading the statute would only punish that subset of maritime murders and robberies that would be capital offenses on land. As it happens, federal law did not prescribe death for any robbery committed on land, no matter how grand or greedy. The defendants stood accused only of stealing goods from a ship. Under the broader interpretation urged by the government, they would hang, and on the narrower one, they would not be subject to any punishment at all.²⁴¹

the Legislature to arrange in a proper scale the crimes . . . and to adjust thereto a corresponding gradation of punishments").

236. See *Smith*, 18 U.S. at 163 (citing with approval a treatise that says an assault at sea "without taking or pillaging something away does not constitute the crime" of piracy).

237. 16 U.S. (3 Wheat.) 610, 626–31. The case is most often remembered for Chief Justice Marshall's dictum that the Define and Punish Clause allows Congress to give federal courts universal jurisdiction over pirates. ("[T]here can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.") *Id.* at 630.

238. *Id.* at 617, 626.

239. See DAVID A. CURRIE, THE CONSTITUTION IN CONGRESS, THE FEDERALIST PERIOD, 1789–1801, 95 (1997).

240. *Palmer*, 16 U.S. at 626.

241. *Id.* at 636–37 ("[S]ingular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less, or the question of whether a relative, which may take in three antecedents just as well as one, shall be confined to one alone.").

This created a moral conundrum for the Court. Chief Justice Marshall admitted that the defendants' position had great merit,²⁴² as it would be odd to assume, in the face of an ambiguous statute, that Congress "intend[ed] to make that a capital offence on the high seas, which is not a capital offence on land."²⁴³ Yet the defendants' semantically plausible reading of the statute would have the strange result of leaving piracy as defined by the law of nations entirely unpunished by the statute. Congress, Marshall reasoned, clearly intended to legislate against such robberies, and if it happened to artlessly describe the object of its legislation, the Court need not accept this error at face value. The defendants' reading would embarrass the young country's commercial ambitions by giving free rein to pirates.

Justice Johnson dissented, arguing that the government's proposed interpretation created an unfair "inconsistenc[y]"²⁴⁴ between the punishment of robbery on land and sea: "It is literally true, that under [the majority's interpretation] a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement."²⁴⁵ For Justice Johnson, this inconsistency provided the key to decoding the ambiguous statute: Congress could not have intended to create such a sharp horizontal inequity in its treatment of robbers.

These opinions reveal that all the justices regarded piracy as no more culpable than robbery, and less so than murder. The majority opinion concedes that its interpretation would lead to unequal treatment of morally equal crimes; it does not argue, as it might have, that the disparity in punishment is based on some substantive distinction between land robbery and sea robbery. The majority and minority simply disagree whether considerations of national policy outweigh those of individual justice; Marshall accepted the inconsistency that was most compatible with strong federal power.²⁴⁶ Indeed, the Act's language only becomes ambiguous and in need of interpretation if one thinks that robbery at sea is no more inherently heinous than robbery on the land, or at least not significantly more heinous. Without this background assumption there is no inconsistency, and thus no occasion for the justices' extended consideration of statutory language and legislative intent.

242. *Id.* at 628 ("[The defendants'] argument is entitled to great respect on every account.").

243. *Id.* at 627.

244. *Id.* at 638.

245. *Id.* at 639.

246. Chief Justice Marshall's resolution seems preferable, for horizontal inequity would exist whichever way the case came out, since under Justice Johnson's reading, one who stole thousands on land might be imprisoned while one who stole entire ships at sea would not even violate the law. Given the unavoidability of a land-sea disparity, it made sense to opt for the interpretation that gives some effect to the statute, and some protection to innocent merchant shipping.

B. Earlier Eras' Moral Hierarchies

1. Pre-Modern Recognition of Modern Human Rights Offenses

The laws and mores of the eighteenth and nineteenth centuries severely condemned the specific conduct over which courts seek to assert universal jurisdiction today. Since the Enlightenment, genocide and other war crimes have been regarded as extraordinarily heinous in the sense that NUJ uses the term. Yet the law of nations never made these crimes universally cognizable.²⁴⁷ Nations have recognized and prosecuted war crimes and “significant violations of international humanitarian law” at least since the fifteenth century—but not on a universal jurisdiction basis.²⁴⁸ The eighteenth-century law of nations also denounced several offenses only recently rediscovered by human rights law: population transfer,²⁴⁹ state-sponsored rape,²⁵⁰ and the use of toxins and other weapons of mass destruction.²⁵¹

Yet jurisdiction over such offenses was strictly limited to the nation of the victim or the offenders or where the offense took place.²⁵² The universal condemnation of war crimes, genocide, and the like has not resulted, as some courts and scholars have suggested, from a recent refinement in international mores.²⁵³ Condemnation of these crimes goes back centuries.²⁵⁴ While the Second World War gave genocide and war crimes a greater salience in the conscience of the world, one must remember that part of what made the German atrocities so shocking was that the heinousness of such actions appeared to be taken for granted well before the twentieth century.²⁵⁵ The fact

247. See EMERICH DE VATTTEL, *LAW OF NATIONS* bk. II, § 145 (1833) (opining that since noncombatants “make no resistance . . . consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives. This is so plain a maxim of justice and humanity, that at present every nation in the least degree civilized, acquiesces in it.”).

248. See DUNOFF, RATNER & WIPPMAN, *supra* note 17, at 561.

249. VATTTEL, *supra* note 247, bk. II, § 90 (“It is not allowable to drive a nation out of a country which it inhabits . . . [N]o nation has a right to expel another people from the country they inhabit, in order to settle in it herself.”).

250. *Id.* bk. III, § 145 (“If, sometimes, the furious and ungovernable soldier carries his brutality so far as to violate female chastity . . . the officers lament those excesses; they exert their utmost efforts to put a stop to them; and a prudent and humane general even punishes them whenever he can.”)

251. *Id.* bk. III, § 157 (denouncing the poisoning of water supplies in time of war as a violation of international law).

252. See *id.* bk. III, § 147; SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN* 171 (Michael Silverthorne trans., Cambridge 1991) (1673) (“The extent of licence in war is such that, however far one may have gone *beyond the bounds of humanity* in slaughter or in wasting and plundering property, the opinion of nations does not hold one in infamy.”) (emphasis added). Pufendorf recognized the barbarity of war-time atrocities and yet acknowledged that they were not judicially cognizable.

253. See, e.g., LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 231 (2000) (arguing that the increase in universal jurisdiction offenses in recent decades was caused by a “keen sense of human dignity and solidarity under global conditions of intimate interdependence”).

254. See also ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 154 (1997) (“[I]t is very hard to see any significant advance in moral enlightenment since that time [of Vattel].”).

255. *Eichmann*, 36 I.L.R. at 294–97 (holding that Nuremberg Principles, which proscribe crimes against humanity and war crimes, articulated “principles that have formed part of the customary law of nations ‘since time immemorial . . .’”).

that NUJ offenses have for many centuries shocked the conscience of humanity, almost certainly more so than piracy, and yet were not subject to universal jurisdiction alongside piracy, is further evidence that heinousness was not the rationale for piracy's unique jurisdictional status.

2. *Heinousness Cuts Against Universal Jurisdiction*

Heinousness was not regarded by America's leading jurists as the rationale for universal jurisdiction. *United States v. Furlong*,²⁵⁶ the first American case to use the term "universal jurisdiction,"²⁵⁷ explained that extreme heinousness precludes universal jurisdiction, and that piracy was universally cognizable precisely because it did *not* rank among the worst offenses.²⁵⁸ *Furlong* rejected the heinousness principle that underpins the piracy analogy. The case also shows that the heinousness theory would not be consistent with universal jurisdiction over piracy because piracy was not considered one of the most heinous offenses. This aspect of *Furlong* has been overlooked in subsequent discussions of universal jurisdiction,²⁵⁹ yet it merits close examination because it is one of the extremely rare cases (perhaps the only one) where the Court explicitly compares the heinousness of piracy to the heinousness of other offenses.

The First Congress included murder on the high seas, as well as robbery, as actions that would be deemed piracy.²⁶⁰ The *Furlong* Court considered (in dicta)²⁶¹ whether Congress could, under the Define and Punish Clause, define "murder" to be "piracy."²⁶² Murder, as has been shown, had nothing to do with the international law concept of piracy. The Court concluded that the Define and Punish Clause made international law the outer limit of congressional authority; Congress could not seize jurisdiction over conduct simply by dubbing it "piracy" if that conduct clearly did not involve piracy of the kind contemplated by the law of nations.²⁶³

To support its conclusion, the Court argued that universal jurisdiction over murder does not and could not exist—which demonstrates that murder is not piracy at all, as universally jurisdiction is a crucial correlate of piracy.

256. 18 U.S. (5 Wheat.) 184 (1820).

257. *Id.* at 197. A recent comprehensive report on universal jurisdiction mistakenly states that the term was coined in a 1945 law review article. INT'L L. ASS'N, *Final Report*, *supra* note 4, at 3. This error highlights the general unfamiliarity scholars of universal jurisdiction have with *Furlong*, one of the cases that most strongly challenges the central assumptions of the new universal jurisdiction.

258. *Furlong*, 18 U.S. at 196–99.

259. Rubin takes note of the case, but erroneously states that the Court found piracy to be a more horrible crime than murder. RUBIN, *supra* note 45, at 147.

260. *Furlong*, 18 U.S. at 196.

261. *See id.* at 193 (noting that it is "unnecessary" to decide the murder question because defendant was clearly guilty of traditional piracy, but suggesting that the discussion of the law's provision regarding murder would be valuable guidance for future cases).

262. *Id.* at 195–96.

263. *Id.* at 198.

Piracy is universally cognizable; murder is not; thus murder cannot be piracy. Here the Court comes to the point about heinousness:

[T]here exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered an offense within the criminal jurisdiction of all nations Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the jurisdiction . . . of another nation, has not been acknowledged as a right [of other nations].²⁶⁴

The Court did not expand further on this point, but its reasoning can be reconstructed. Murder inflicts a uniquely grave injury, depriving the victim of his life, while piracy, as the court points out, deprives him only of property. Murder will more likely raise a cry for vengeance in the victim's home state—hence the reference to “the feelings of man”—which will have a great desire to punish the perpetrator. It would be both unnecessary and officious for a third-party nation to interpose its own judicial processes.²⁶⁵ Judeo-Christian tradition and much Western moral philosophy has long held that avenging murder is not only the right of the victim's political unit, but its duty. Universal jurisdiction over murder would usurp this deeply felt responsibility and thus antagonize the nation with traditional jurisdiction. Because robbery shocks the conscience less than murder,²⁶⁶ it is less likely that a directly injured nation would be determined to prosecute pirates, and thus less likely that it would be offended if another nation stepped in to do so. Thus *Furlong* provides strong support for the view that the nineteenth-century ranking of crimes by their “heinousness” did not differ in any relevant respect from today's ranking. *Furlong* also contradicts the theory that the recognition of universal offenses in the law of nations turns on the heinousness of the offense or the universal repugnance it generates.

264. *Id.* at 196–97.

265. Both the concerns about redundant effort and intermeddling can be seen in the opinion. The Court mentions the former consideration explicitly and adverts to the latter when it warns that extending the universal treatment of piracy to murder would result in the “most offensive interference with the governments of other nations.” *Id.* at 198.

266. Justice Johnson did not cite any authority for the view that robbery is less heinous than murder, referring only to the “feelings of man.” The position was as obvious in 1820 as today. Similarly, in his *Palmer* dissent, he cites no authority to show that robbery on land and sea ought to be equally culpable, relying instead on “natural reason.” 16 U.S. at 639. Justice Johnson was a positivist judge not inclined to drawing law from abstract moral principles. See RUBIN, *supra* note 45, at 147. In light of his judicial philosophy, Justice Johnson essentially takes judicial notice of prevailing moral sentiments in his *Furlong* and *Palmer* opinions.

IV. EVIDENCE FOR THE PIRACY ANALOGY

There is little affirmative evidence that piracy jurisdiction was premised on heinousness or that piracy jurisdiction was based on general principles applicable to other offenses. However, many commentators invoke the writings of the influential Swiss philosopher Emerich de Vattel in support of the view that heinousness has for hundreds of years been the constant rationale for universal jurisdiction.²⁶⁷ These scholars point to a passage from Vattel's *Law of Nations* that on its face strongly endorses, normatively and descriptively, the heinousness view of universal jurisdiction:

[A]lthough the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall.²⁶⁸

Yet the much-cited passage²⁶⁹—not to mention the less-cited sentences that immediately follow it—on closer reading tends to show exactly the opposite. Vattel did not think even the most depraved offenses were or should be universally cognizable. A second class of evidence consists of the many references to piracy as a heinous offense. Section B argues that such condemnations were rhetorical. Judges apply such epithets to many offenses not even plausibly subject to universal jurisdiction. The use of such words says nothing about whether piracy was seen, as the piracy analogy would have it, as a *particularly* heinous crime.

A. Vattel

Vattel could be extraordinarily useful in reconstructing the founding generation's views of universal jurisdiction because his treatise was widely read and admired by the leading figures in American politics and jurisprudence before and after the founding of the Republic.²⁷⁰ Courts and scholars con-

267. See, e.g., Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 20 n.40 (1994); Blum & Steinhardt, *supra* note 10, at 60 & n.36; Stephens, *supra* note 140, at 41 n.173.

268. VATTEL, *supra* note 247, bk. I, § 233.

269. It was used to support expanded universal jurisdiction at least as early as the District Court opinion in *Eichmann*. See *Eichmann*, 36 I.L.R. at 28–29.

270. Students of Vattel included Thomas Jefferson, James Madison, and Alexander Hamilton, who frequently cited him in his cabinet opinions and public arguments. See DANIEL G. LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 11, 65 (1985). Vattel was the most cited authority on international law from his work's publication in 1758 through the first several decades of the nineteenth century. See RUBIN, *supra* note 254, at 45 n.25. Chief Justice Marshall frequently turned to Vattel for guidance. See, e.g.,

tinue to turn to Vattel for a better understanding of the Founders' conception of international relations and international law.²⁷¹ Supporters of universal jurisdiction argue that the Vattel passage proves that "pirates were merely a type . . . of universal offender," and that the doctrine always encompassed any "heinous" offense.²⁷² When examined more closely, however, this paragraph shows that Vattel opposed universal jurisdiction outside the piracy context, and perhaps even for piracy.

Vattel was not a treatise-writer in the contemporary sense; he did not confine himself to summarizing or elucidating the state of the law. Rather, he was a political philosopher, as often prescriptive as descriptive.²⁷³ Vattel distinguishes pirates from other heinous offenders by noting that the former "are" universally punished, and the latter "ought" to be. The passage in question does not purport to describe the customary practice of the time, but rather his views of sound policy.²⁷⁴

Second, *The Law of Nations* mostly speaks to the exercise of executive, not judicial, authority.²⁷⁵ Courts in the early years of the Republic understood this; they carefully distinguished Vattel's judicially oriented pronouncements from his political ones.²⁷⁶ The passage used to support the piracy analogy appears to fall in the latter category. While it speaks of "the punishment of crimes," a careful reading of the *hostis humani* passage suggests that it contemplates direct executive action, not criminal prosecution. If poisoners ought be "exterminated wherever they are seized," the exterminator is presumably a soldier or policeman. This does not appear to entail bringing the "seized" offender back for trial. This point is important because a serious objection to universal jurisdiction, particularly in a constitutional system of

Brown v. United States, 12 U.S. 110, 124 (1814); *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 143 (1812) (arguing that just as foreign ambassadors have immunity, foreign troops taking asylum in another country are similarly exempt from its jurisdiction). Still, Justice Story cautioned that even Vattel cannot be read as an infallible guide to international law. *Brown*, 12 U.S. at 140–41 (dissenting) ("Of the character of Vattel as a jurist, I shall not undertake to express an opinion. That he has great merit is conceded; though a learned civilian, Sir James Mac Intosh, informs us that he has fallen into great mistakes in important 'practical discussions of public law.'").

271. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 n.12 (1978) (noting that Vattel was the most cited authority on international law in the first 50 years of the Republic, and relying on him to determine meaning of terms "treaty" and "compact" as used in the Constitution).

272. Blum & Steinhardt, *supra* note 10, at 60 & n.36. *See also* Orentlicher, *supra* note 126, at 2556 n.77 (arguing that the Vattel passage supports "an exception to the general rule that states could punish only crimes against themselves if the offense were so heinous that it offended all mankind").

273. *See LANG*, *supra* note 270, at 10, 15–16 (discussing Vattel as a philosopher and observing that "Vattel's goal was to justify [the European nation-state system and the balance of power] not simply in terms of necessity of expedience, but in terms of right").

274. The paragraph in question does not cite to a single case of universal jurisdiction over non-pirates, or refer to any state practice along those lines.

275. Vattel deals with criminal jurisdiction in two other sections of the book that are explicitly labeled "jurisdiction." *VATTEL*, *supra* note 247, bk. II, §§ 84–85.

276. *See, e.g.*, *Rose v. Himely*, 8 U.S. 241, 272 (1807) (Marshall, C.J.) ("The doctrines of Vattel have been particularly referred to. But the language of that writer [on the matter of when a rebellious area should become a new sovereign] is obviously addressed to sovereigns, not to courts."); *The Ambrose Light*, 25 F. at 433–34.

separated governmental powers, is that it gives courts too great a role in matters affecting foreign relations at the expense of the political branches.

The non-judicial interpretation of the passage is strengthened by Vattel's use of the term *hostis humani generis*. "Hostis" means "enemy" in the military sense. Its application to pirates stemmed from the theory that a nation's vessels could attack pirates as if they were military enemies, even absent a declaration of war or any formal hostilities. The term's provenance has long been forgotten by all but a few scholars of piracy and the law of war, but it was certainly understood by Vattel, a close reader of Grotius. By calling the broader category of wrongdoer "hostis," Vattel situates this passage in the context of military operations (which remain a primary focus throughout the book), and not the context of adjudication.

The remainder of Vattel's paragraph, not quoted by subsequent proponents of NUJ, does discuss judicial proceedings—and rejects universal jurisdiction. Vattel argues that if the nation that has a traditional jurisdictional nexus wishes to exercise jurisdiction over a perpetrator of non-piratical heinous crimes who is in the custody of another nation, the latter nation should not conduct its own proceeding. Rather, it should turn the offender over to the state with a jurisdictional connection, since that is the place "principally interested in punishing him."²⁷⁷

However, the passage does suggest that the home state's desire to punish the offender is relevant in establishing its superior jurisdictional claim. This supports the view that Vattel did not recommend extradition to nations that would not conduct a good-faith prosecution of the offense. However, Vattel presented an additional and separate reason for favoring the jurisdictional claims of the offender's home state over any assertions of universal jurisdiction. Traditional jurisdiction trumps because "it is proper to have criminals regularly convicted by a trial in due form of law."²⁷⁸ This again hints that Vattel's discussion of an "extermination" by a disinterested nation did not refer to any kind of trial at all, but rather referred to summary proceedings on the high seas. It also shows that he may have been concerned with the due process problems inherent in having a suspect tried in a forum with which he has no jurisdictional link. Thus Vattel did not see the broad *hostis humani generis* status as providing a basis for universal jurisdiction, for such jurisdiction could be exercised by any nation over the objection of the offender's home state.

In a different section of his book, Vattel seems to address the possibility of universal jurisdiction, only to reject it. He writes that if a state is not itself directly harmed by a violation of the law of nations, it has no business attempting to punish that violation.²⁷⁹ Elsewhere he argues that criminal ju-

277. VATTEL, *supra* note 247, bk. I, § 233.

278. *Id.*

279. See *id.* bk. II, § 55. As an example, Vattel wrote:

risdiction should be confined to the territorial principle, allowing a nation to take jurisdiction over offenses committed by its *own* citizens abroad only when they would be discriminated against by the tribunal with territorial jurisdiction.²⁸⁰ These sentiments accord fully with the central themes of his work. *The Law of Nations* is a defense of a robust notion of national sovereignty, one that trumps notions of universal justice.²⁸¹ "It does not, then, belong to any foreign power to take cognizance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it,"²⁸² Vattel wrote in a passage that would be quoted by Alexander Hamilton.²⁸³

B. Unreliable Epithets

Supporters of the heinousness theory of universal jurisdiction point out that judges in piracy cases sometimes described the offense as "heinous," or "odious," or called its perpetrators *hostis humani generis*.²⁸⁴ In a weak sense, any felony can be accurately described as "heinous." For heinousness to motivate universal jurisdiction, piracy would have to be more heinous than all other crimes; judicial references to piracy's heinousness would need to indicate that piracy was a singularly heinous offense. However, this does not appear to be what judges meant when they called piracy "heinous." Rather, they used the word "heinous" to indicate that piracy was a serious felony, one among many serious felonies, all of which were heinous.²⁸⁵ Judges did not set out to demonstrate that there was anything particularly bad about piracy that might account for its special jurisdictional status. More importantly, the condemnatory adjectives so often attached to piracy in judicial opinions are rhetoric, not substantive reasoning. This is evidenced by the promiscuity with which courts have labeled various offenses as "heinous." The Supreme

The Spaniards violated all rules when they set themselves up as judges of the Inca Athualpa. If that prince had violated the law of nations with respect to *them*, they would have had a right to punish him. But they accused him of having put some of *his subjects* to death . . . for which he was not at all accountable to them. *Id.*(emphasis added).

280. *Id.* bk. II, § 84.

281. LANG, *supra* note 270, at 18.

282. VATTEL, *supra* note 247, bk. II, § 55.

283. HAMILTON, *supra* note 144, at 60.

284. See, e.g., Randall, *supra* note 10, at 794 & n.51. Randall cites only one case that denounces piracy as heinous. That opinion does not say that piracy is particularly or uniquely heinous, only that it is heinous, which is a trivial observation; this is just another way of saying it is a serious offense. But the heinousness theory does not posit that piracy was universally cognizable because it was a serious offense; rather, it contends that pirates transgressed internationally accepted mores more than other crimes. Cases that simply observe piracy to be "heinous" do not prove that heinousness motivated universal jurisdiction over piracy.

285. One judge observed that the universal condemnation of piracy arose from the gravity of the offense by remarking that it belongs "among the highest crimes." This suggests that it did not hold pride of place among heinous crimes, and that many equally or more heinous crimes were not subject to universal jurisdiction. *The Ambrose Light*, 25 F. at 417 (emphasis added).

Court has variously bestowed the title of Most Heinous Crime to murder²⁸⁶ and treason;²⁸⁷ piracy thus did not stand out for its heinousness.

Judges commonly denounce criminals for the wantonness of their offense. Indeed, were an act not heinous to some degree, it would scarcely be a felony. Criminality implies a *degree* of heinousness, and thus discussing the heinousness of the offense need be nothing more than rather obvious rhetoric. Consider the variety of offenses that federal appellate judges have condemned as “heinous”: attempted murder,²⁸⁸ rape,²⁸⁹ kidnapping,²⁹⁰ fomenting communist insurrection,²⁹¹ jury-tampering,²⁹² and pandering.²⁹³ While international consensus might only exist as to the first two of these offenses, the list does illustrate the problem of drawing inferences from adjectives. Furthermore, the inference would be weakest with piracy, a capital offense. Judges would suffer severe cognitive dissonance if they condemned men to death for innocuous offenses. It thus means little when judges describe the crime as heinous.²⁹⁴ This could be as much a justification for the inevitable punishment, as for the exercise of universal jurisdiction. The use of adjectives like “heinous” by judges seems primarily rhetorical, and certainly does not demonstrate the degree of heinousness necessary for universal jurisdiction.

The ominous-sounding epithet *hostis humani generis* also suggests, at first glance, that it was the unrestrained promiscuity of piratical attacks that made them universally cognizable. But the *hostis* rhetoric also fails to establish a basis for the analogy between piracy and NUJ. The phrase does not give a *reason* for the assertion of universal jurisdiction over pirates—it merely states the legal conclusion that any nation can prosecute pirates. Indeed, *hostis* means enemy in the sense of a wartime foe; the phrase was originally used to describe sea raiders with a substantial degree of political organization who literally warred with all their neighbors. It was then appropriated to a completely different context, that of ordinary robbers plying their trade

286. *Davis v. United States*, 160 U.S. 469, 484 (1895) (describing murder as “that heinous crime”).

287. *Hanauer v. Doane*, 79 U.S. 342, 347 (1870) (“No crime is greater than treason”).

288. *United States ex rel. Villa v. Fairman*, 810 F.2d 715, 717 (7th Cir. 1987) (“Attempted murder in the course of another felony is a heinous crime . . .”).

289. *United States v. Quiver*, 241 U.S. 602, 605 (1916) (“Rape also is concededly an offense against the person, and is generally regarded as among the most heinous, so much so that death is often prescribed as the punishment.”).

290. *Bates v. Johnston*, 111 F.2d 966, 967 (9th Cir. 1940) (“Kidnaping [sic] is a heinous offense.” (quoting *Bailey v. United States*, 74 F.2d 451, 453 (10th Cir. 1934))).

291. *United States v. Dennis*, 183 F.2d 201, 205, 215 (2d Cir. 1950) (holding statute criminalizing Communist Party organizing aimed at “knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying’ the government by ‘force and violence.’” as not being overly vague because the conduct is a “moral offense” that is “heinous” enough to be *malum in se*, and thus people can be presumed to know the illegality of their actions even without specific statutory description).

292. *Creekmore v. United States*, 237 F. 743, 747 (8th Cir. 1916) (noting “one of the most heinous offenses known to the law, that of ‘jury fixing’ . . .”).

293. *Johnson v. United States*, 260 F. 783, 786 (9th Cir. 1919) (condemning the “most heinous offense of a husband willfully permitting his wife to practice prostitution . . .”).

294. *See, e.g., Quiver*, 241 U.S. at 605.

at sea.²⁹⁵ No one supposed the pirate to actually be the enemy of all mankind;²⁹⁶ it was a legal fiction, a "mere embellishment, and no part of the legal definition."²⁹⁷ Indeed, if pirates were literally antagonistic to all mankind, any nation could prosecute them without resort to "universal jurisdiction," since standard jurisdictional categories allow a state to prosecute those who attack its interests. At most, the phrase means that the pirate will be treated as if he were the enemy of all mankind.

The *hostis* criterion simply restates another element of the piracy offense—attacking commerce without a writ of marque. Those commissions precluded the bearer from attacking ships of the issuing state and its allies; thus the privateer was at most the enemy of some or much of mankind. Yet the fact of his writ of marque proved that he was not against all mankind—he had a patron. The pirate, by refusing to obtain a writ, which would have been easy to secure, indicated his willingness to attack any targets of opportunity regardless of their flag, though in practice pirates usually preyed on the shipping of one or a few states. Seen in this way, *hostis* just stands in for the need for commerce raiders to obtain sovereign protection.²⁹⁸ *Hostis* is a criterion that deals simply with regulatory formalities and says nothing about the substantive conduct of pirates.

Furthermore, courts rejected the idea that actual hostility to the whole world was what made piracy universally cognizable; contemporaries understood that the phrase could not be taken at face value.²⁹⁹ Indeed, the specific claim that it was the proliferation of piratical attacks that defined the offense was raised and rejected in one of leading American piracy cases, *The Ambrose Light*, a prize proceeding.³⁰⁰ The claimant's ship, *The Ambrose Light*, belonged to the fleet of a Colombian rebel group engaged in the blockade of the government-held port of Cartagena. The evidence in the case showed that the vessel, carrying rebel soldiers, only sought action against the recognized government of Colombia, in furtherance of the insurgency.³⁰¹ The claimants argued that since their only enemies were their rivals for control of Colombia, they could not be, literally, enemies of all mankind, and thus the New York prize court had neither jurisdiction nor a basis for condemnation.

295. See RUBIN, *supra* note 45, at 91–95.

296. *The Ambrose Light*, 25 F. at 423 ("It is doubtful whether any pirates ever really practiced, or intended to practice, indiscriminate robbery upon all vessels alike; and it is far from true that no acts are piratical by the law of nations except such as are of that description . . .").

297. *Id.*

298. See *The Malek Adhel*, 43 U.S. 210, 232 (1844) ("A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, *without . . . any pretence of public authority*." (emphasis added)).

299. See *The Ambrose Light*, 25 F. at 423–24 (citing numerous examples of piracies that were not characterized by general or universal hostility but were nonetheless treated by law as piracy).

300. *Id.*

301. *Id.* at 411.

The court rejected this view,³⁰² for while some pirates might have practiced “indiscriminate violence and robbery” of the kind that might literally make them enemies of all mankind, most pirates were more focused or restrained in their depredations. Thus, while universal jurisdiction would extend to both types of pirates, the latter class of offenders would be *hostis humani generis* only in the “general sense signifying a willful disregard of the essential order and welfare of human society, such as characterizes all other high crimes.”³⁰³ This undermines the contention that the concept of *hostis humani generis* can be used to explain why piracy was considered especially heinous and was thus treated different from other offenses with respect to jurisdiction.

CONCLUSION

Heinousness is both the unifying principle of NUJ and the most promising basis for analogizing the modern universal offenses to piracy.³⁰⁴ However, this Article has presented evidence that universal jurisdiction over piracy had nothing to do with the heinousness or moral gravity of the offense. Indeed, since piracy was not regarded as being uniquely heinous, heinousness could not possibly have motivated its unique jurisdictional status. Thus NUJ cannot be sustained through the rationale that has brought it wide acceptance in the past decade.

One might think that despite the weakness of the heinousness rationale, there may better justifications that have simply been ignored. Some form of universal jurisdiction may in theory be justifiable in a number of different ways, but this Article concerns itself not with universal jurisdiction in theory, but with today’s universal jurisdiction, which is about human rights offenses, that is, crimes chosen for their heinousness. It is hard to conceive of an alternate rationale that would encompass the current roster of universal crimes. There may be some non-heinousness explanation for piracy jurisdiction, but it would not provide a rationale for today’s assertions of universal

302. *Id.* at 443. This entire discussion is obiter, though ostensibly directed at a “holding” in the case. Later in the opinion, through some forced reasoning, the court concluded that the U.S. had implicitly recognized the Colombian rebels as belligerents in a civil war, giving them the right to commission privateers. Thus *The Ambrose Light*’s commission from a rebel commander received full effect, preventing the condemnation of the ship as piratical. *Id.* Given the validity of the commission, there was no need to consider whether, had the expedition in fact been piratical, it would have found a defense in its lack of universal hostility. The court should first have determined whether the rebels had been recognized, implicitly or explicitly, as belligerents; then it would not have needed to proceed further.

303. *Id.* at 424. *The Ambrose Light* observes that judges also use the term *hostis humani generis* to describe serious but not-piratical crimes. Thus Lord Hale also denounced murderers as “*hostis humani generis*,” much as courts denounced both murder and piracy as heinous crimes—although universal jurisdiction only existed for the latter offense. *See id.* These were both terms of opprobrium, not reasons for exercising universal jurisdiction.

304. *See* REYDAMS, *supra* note 15, at 58 (observing that piracy’s locus on the high seas and commission by private actors make it “inappropriate for analogies” to modern universal jurisdiction offenses); ORNELLACHER, *supra* note 126, at 2557 n.78 (enumerating differences between piracy and new universal offenses).

jurisdiction. Similarly, there may be a plausible account of why heinous crimes should be universally prosecuted. But this argument would no longer have the backing of history. There have always been heinous offenses, but nations have previously been unwilling to and even hostile about ceding their sovereign jurisdiction over them. Thus perhaps the principle result of stripping away the piracy analogy is to reveal the untested and fragile nature of modern universal jurisdiction.

The fallacy of the piracy analogy casts doubt on the soundness of the cases that have used the analogy to justify adopting NUJ. The evidence presented in this Article lends support to the judges that have rejected NUJ³⁰⁵ and suggests that the many courts of appeals that have not taken a position on the matter³⁰⁶ would be ill-advised to follow *Filartiga*, to the extent that *Filartiga* relied on inapposite historical precedent. Indeed, this Article has presented some evidence that the founding generation did not recognize or was hostile to heinousness-based universal jurisdiction. While this evidence is limited, it does suggest, given the background presumption against interpreting statutes to apply extraterritorially,³⁰⁷ that federal courts should hesitate before assuming universal jurisdiction.³⁰⁸ This Article also has implications for national courts and international tribunals that might seek to exercise NUJ, such as the ICC. It is not clear whether the ICC has universal jurisdiction. In answering this question for itself, the ICC will likely consider whether non-member states would support its exercise of such jurisdiction over heinous crimes, for resistance by these states would undermine the ICC's prestige and credibility.

305. In separate opinions, two judges of the *Tel-Oren* panel rejected the contention that ATCA gives the federal courts universal jurisdiction. *See* 726 F.2d at 801 (Bork, J.); *id.* at 826 n.5 (Robb, J.). *See also* Al Odah v. United States, 321 F.3d 1134, 1146–47 (D.C. Cir. 2003) (Randolph, J., concurring) (arguing that federal courts have no power to exercise universal jurisdiction under ATCA).

306. The Ninth and Eleventh Circuits have followed the Second Circuit in finding universal jurisdiction under ATCA. *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992). Apart from the D.C. Circuit, all the other courts of appeals have not reached the universal jurisdiction question.

307. *See* E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). *See also* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L. L. 85, 85 (1998) ("Early in the 19th Century, the Supreme Court applied the presumption to limit the reach of federal customs and piracy laws.").

308. This Article does not establish this point, but only provides some suggestive evidence. It shows that it is unlikely that the drafters of the Constitution and ATCA intended to allow for universal jurisdiction over crimes on the basis of their heinousness. Original intent need not be dispositive in interpretation, and this Article takes no position on that long-contested issue. However, because the text of the Constitution and ATCA do not speak directly to the question of NUJ, intent is a particularly important interpretive tool, and the evidence of intent is fairly one-sided. This Article takes no position on the view the Framers might have taken of some form of universal jurisdiction premised on something other than heinousness, such as statelessness.

